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The common European asylum system : progressing along the path?

Jennifer Humphreys
Lehigh University

Humphreys,
Jennifer

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Progressing along the Path?

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Jennifer Humphreys

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Co-Adviser

Co-Adviser

Chairperson of Department

For Maximilien

Contents

Table of Acronyms

CEAS	Common European Asylum System
EC	European Community
EEC	European Economic Community
ECHR	European Convention on Human Rights
EC of HR	European Court of Human Rights
ECJ	European Court of Justice
EP	European Parliament
EU	European Union
QMV	Qualified Majority Voting
SEA	Single European Act
UNHCR	United Nations High Commissioner for Refugees

Abstract

Asylum seekers and refugees are very much a part of the contemporary world. Far from becoming an issue of the past, their relevance is sadly a continuing feature. This can be reflected in the current attempts of the European Union to construct a common policy, which will serve to provide consistency across the region by harmonizing procedures and systems. Using a path dependent framework, which identifies factors that have combined to determine the trajectory the actors must follow, I examine these efforts, and question whether progress can really be achieved when taking into account the constraining factors inherent in the path that inevitably are playing a role in shaping the outcome of the system. I assert that progress must be viewed in a multi-dimensional format and this study is considering two strands of this. In terms of structural, institutional development there has beyond doubt been advancement, due to the aligning of interests. However, in regards to human rights and the principal priority of protecting the world's vulnerable, which asylum policy should reflect, the emerging system is lacking in substance the features it is claiming it will endorse. Thus an examination of the path allows for an understanding of the measures produced. The implications of which are outlined in the final chapter, where a case study acknowledges the humanitarian costs that are embedded in the current policy approach, revealing the range and scope of obstacles and barriers that have been placed in front of refugees, which is illuminating as it shows the lack of substantial progress the EU has made when attempting to create a system that fully adheres to international law as is so often preached.

Chapter One: Introduction and Contextual Factors

Introduction

Kamisa lived in Chechnya with her four children; one son aged two, and three daughters aged nine, twelve, and fourteen. Her husband had already fled to Austria, where he was living with members of his family, awaiting her arrival. Unable to enter the European Union (EU) legally due to the restriction-based immigration policies, she paid a human smuggler, who was to arrange for their passage across the Slovakian border, two thousand and seven hundred dollars. From there, having entered the EU, her travel was facilitated by the prior removal of some of the internal border controls. On the day of the journey, her and her children were driven for many hours by a man they had previously never met. Arriving in a deserted location, he forced them out of the car and drove off. It was raining heavily with strong winds. Having walked for days through forest in the hilly area, Kamisa eventually stopped for rest and shelter. They ate the limited food supplies she had packed. Her nine year old daughter entered into a coma. Her fourteen year old died. Having screamed for help, Kamisa was forced to make the decision to leave her daughters and search once again for assistance. Taking her son with her, she said goodbye to her girls; her twelve year old was aware of what was happening, but too ill to move. After finding the Polish border and acquiring the help she had so desperately

sought, her daughters were located. All of them lay dead, in their summer dresses under the blanket of leaves their mother had covered them with.[1]

A day that began filled with hope turned dramatically into tragedy. A time when Kamisa and her children had anticipated fleeing persecution and relocating to Austria had not taken place as planned. She is currently recovering in Poland, where her husband has traveled to be with her and their son. However, the great majority of Chechnyan asylum seekers are refused refugee status in Poland, presenting little hope for this family. If their application is denied, they will first be offered voluntary return, and if they refuse that they will be forcibly removed from the country.[2]

Depicting a true story that occurred in September 2007, the real tragedy can only be understood when recognizing that it is not unique. The United Nations High Commissioner for Refugees (UNHCR), the principal refugee agency, has expressed concerns on multiple occasions that refugees are increasingly turning to networks that smuggle people across international borders because industrialized countries are imposing restrictions on their travel. Implications of this development pose additional problems to the already vulnerable refugee, as research suggests the common motivations and thus priorities of a smuggler fail to primarily consider the well-being of their client. These transnational businessmen effectively function according to the market's demands, seeking to maximize profit and minimize outgoings.[3] The routes and procedures used in

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[1] This was a well-documented story. Reports of it can be found at: http://www.bbc.co.uk/blogs/thereporters/markmardell/2008/01/09/index.html , UNHCR, *Refugees,* No. 148, Issue 4 (2007) pp. 4-5 and http://www.polskieradio.pl/zagranica/news/artykul58801.html

[2] Due to the large amount of publicity this particular case has received, Kamisa may have more of a chance is gaining refugee status, as the first lady of Poland has offered her personal support.

[3] Morrison, John. *The trafficking and smuggling of refugees the end game in European asylum policy?* Pre-Publication Edition, July 2000 Found at: http://www.ecre.org/eu_developments/controls/traffick.pdf
UNHCR. *Refugees* 4, no. 148 (2007) : 12-15

transit are often precarious in regard to safety, with both land and sea crossings producing a host of suffering that provides no guarantee of a safe arrival. Furthermore, the grey areas between smuggling and trafficking can result in dire conditions for those seeking protection.[4]

To consider refugees worldwide, they suffer at the hands of state and non-state actors alike. Some seek asylum in Western countries, in a bid to end the persecution, whilst the great majority remain in their region of origin, fleeing to neighboring countries in search of protection. Having possibly faced torture, ill-treatment, and sexual assault, refugees are often severely traumatized, some with irreparable psychological and physical damage. Finding a safe haven today however is increasingly difficult for those in need, as restrictions imposed by developed states impede access to refugee status.

A number of refugee crises in the 1990s highlighted the consequences of persecution and the subsequent mass movement as a contemporary international challenge.[5] Unable to ignore such widespread suffering, and being confronted by various influxes of asylum seekers, developed countries began to react to what was becoming a politically contentious problem. In the EU, member-states faced a series of migration movements as governments in the former Soviet Republics and allied states began to collapse, some deteriorating into civil and ethnic violence. Hostility towards asylum seekers became rife, resulting in national governments first responding individually, followed by calls for

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[4] John Morrison asserts there are key differences between smuggling and trafficking. The first infers a knowing and conscious choice, whereas the second involves abduction or force. The two however should not be seen as separate categories, as a journey can begin as an active choice, but due to the reliance a migrant has on their courier, it can easily transform into a coercive act. For more on this subject, see: Morrison, John. *The trafficking and smuggling of refugees the end game in European asylum policy?* Pre-Publication Edition, July 2000 Found at: http://www.ecre.org/eu_developments/controls/traffick.pdf

[5] For a personal discussion on the major refugee crises, see: Ogata, Sadako. *The Turbulent Decade: Confronting the Refugee Crises of the 1990s*. W. W. Norton & Company, Inc., 2005.
Specific titles also exist, such as: Van Selm, Joanne, ed. *Kosovo's Refugees in the European Union*. New York: Pinter, 2000.

collective action at the regional level. The idea that a large majority of the world's refugees arrive in Europe, a common fear in most EU countries, is absurd when glancing fleetingly at any recent statistics.[6] Not only does the EU receive only a small percentage of the world's refugee population, but also the number of asylum seekers applying has been decreasing steadily since the mid-1990s.[7] In 2006, it was the lowest it has been since 1980.[8] Reality, however, is unimportant when positioned beside public perception. People do not act on fact, but instead on what they presume to be fact.[9] As a politically salient and highly sensitive issue, asylum became a central topic in both the national and EU arenas throughout the 1990s and into the new millennium. Reflecting this is the current efforts to create a Common European Asylum System (CEAS), which will result in the laws and systems of member-states acting uniformly.

Kamisa's story helps in identifying the potentially inaccurate perception that the EU holds of itself in the global context. As a regional power, the EU prides itself as being the moral guardian of the world. It claims not simply to be an observer but an active force ensuring human rights and welfare. This is particularly in respect to its relations with the USA, the key superpower in the world. Struggling to compete with the US in global affairs, moral superiority is viewed as a powerful alternative to the traditional strength of the military.[10] Harnessing this is a key way of differentiating themselves. The EU institutions disapprove and lobby against American activities and initiatives, enabling the EU to assert their moral authority. Human rights abuses such as capital punishment, CIA

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[6] UNHCR. *Statistical Yearbook 2006: Trends in Displacement, Protection and Solutions* (December, 2007).
[7] Whittaker, David. *Asylum Seekers and Refugees in the Contemporary World*. New York: Routledge, 2006 : 42.
[8] UNHCR. *Statistical Yearbook 2006: Trends in Displacement, Protection and Solutions* (December, 2007).
[9] Boswell, Christina. "European Values and the Asylum Crisis". *International Affairs* 76, no. 3 (July 2000) : 537-557.
[10] For a discussion on the concepts of hard and soft power, see: Reid, T. R. *The United States of Europe*. New York: Penguin Books, 2004.

activities on EU territory, or detainment centers, like the infamous Guantanamo Bay Detention Camp are issues that receive critical attention, which run in parallel to other areas where the EU considers itself to be *ahead*, such as social and environmental policy. Proclamations supporting this position have been reiterated throughout the years at various Council meetings and Treaty declarations. Having drafted a Charter of Fundamental Rights,[11] the preamble stated:

> "Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities".[12]

This reflects the intentions of the EU as a participator in global affairs. With such foundations, the EU should be a central player in upholding and reinforcing human rights on a global scale, particularly in regard to the ongoing project of the CEAS.

Reviewing Kamisa's story however raises questions about whether the moral authority the EU believes it possesses is simply a hollow instrument. By blocking the entry of vulnerable people in the world to the territory of member-states, the EU is refusing to acknowledge the consequences of human rights abuses by denying protection to those that are persecuted. This distinction will provide the basic dichotomy that will underline the study. The challenge will be to explain why a community (supposedly) built upon human rights principles has designed such barriers obstructing refugees, comprehensively achieved by analyzing how and why the CEAS is being created. Prior to this however, a

[11] This Charter is not a binding piece of legislation, it was merely solemnly declared. It has been put into the Lisbon Treaty however, so as long as the Lisbon Treaty is ratified by all twenty seven member-states, it will become a binding force in 2009

[12] Charter of Fundamental Rights of the European Union, (2000/C 364/01)

basic overview of key terms and contextual factors will lay the foundations for this contemporary discussion. The theoretical framework of path-dependency that will be applied in this study will also be introduced so as to enable a fuller understanding of the aims of this thesis, which will be outlined in the final section of the chapter.

Definitions

A number of terms are often used interchangeably in popular discourse across the EU, which creates a level of confusion amongst the citizenry. They include *Asylum Seeker*, *Refugee*, *Economic Migrant*, *Bogus Asylum Seeker*, and *Illegal Immigrant.* One reason for this is that the terms do overlap, meaning a person can be grouped into more than one category. However when analyzing this subject in detail, specifics should be clarified to dispel potential uncertainty. A *Refugee* in the EU has the same definition as that from *The United Nations Convention Relating to the Status of Refugees* (1951):

> "A person who is outside his/her country of nationality or habitual residence; has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion; and is unable or unwilling to avail himself/herself of the protection of that country, or to return there, for fear of persecution."[13]

In addition to the well-founded fears that the Convention covers, the EU has extended the persecution to what women can face, which can include the sexual violence they encounter and the harsh and dangerous practices such as Female Genital Mutilation. An *Asylum Seeker* is a person who has left their country of origin and is seeking political protection in the form of either refugee or subsidiary status. The latter status is a recent

[13] Taken from Article 1 of *The United Nations Convention Relating to the Status of Refugees* (1951). It can also be found at:
http://ec.europa.eu/justice_home/fsj/asylum/subsidiary/fsj_asylum_subsidiary_en.htm

EU creation that is generally not discussed on the popular level. It tends to be more temporary and contains less rights. It is for persons who are unable to return home due to violence or war but it is assumed that this will be of short duration and the individuals will be able to return after. It is also for those who face an obvious threat to their life, but one that is not directly posed at them as an individual.

A *Refugee*, as well as being categorized as an *Asylum Seeker*, can also be termed an *Illegal Immigrant*. This is because the current functioning of policies, for the most part, blocks *Asylum Seekers* from entering legally. *Economic Migrants* and *Bogus Asylum Seekers* are sometimes the same thing. They mainly enter to better their lives economically, but do not fit into the category of *Refugee*; in short, they are fleeing poverty rather than persecution. Some enter through the asylum process and therefore can be called *Bogus Asylum Seekers*, *Economic Migrants,* and *Illegal Immigrants*. Others can just enter illegally and due to the presence of immigrant networks and corroborators do not officially "exist" in the state, therefore are merely *Economic Migrants* and *Illegal Immigrants*. On top of these categories are immigrants who enter legally. They can either be from another EU state or have access through visa routes. The public however, due to the overwhelming confusion that pervades this discourse, is unable to distinguish them as such. This overlap of definitions produces obvious problems when attempting to examine one strand of the subject. This problem is heightened when considering the extent of mixed migration that occurs. [14] Despite this hazy categorization however, merely the fact that an attempt has been made to understand what these groups can include allows for a

[14] Mixed Migration denotes the movement of both economic migrants and refugees. They use the same smuggling networks, the same routes and the same entry points. It is a movement that requires the state to distinguish between the two groups of people, which can be immensely difficult. For more, see: UNHCR. *Refugees* 2, no. 135 (2004).

reasonable discussion on the topic. Hence when this study analyzes asylum policy, all these groups and connections must be taken into account, because political decisions cannot simply be based on *asylum seekers* who are, in fact, *refugees*.

Contextual Factors

As already noted, the issue of asylum in the EU is one of contention, sensitivity, and importance. It has not always been like this however, only becoming so in the last two decades of the twentieth century. This section will establish the contextual factors to illustrate first, the internationally recognized right to seek refugee status and then, how the politics of asylum seekers and refugees has become so politically charged. It will chronicle the important historical developments relating to key themes starting after World War II. Following this a brief look at the EU as a regional entity will establish the basis for the later institutional discussion.

Right to Refugee status

The right to seek refugee status is codified in a number of international instruments and some national constitutions.[15] It places an obligation on the signatory state to allow foreign nationals to reside on their territory in order to avoid persecution in their homeland. The major international treaty that will be the focus of this paper, as it has globally recognized significance and is constantly referenced by the EU, is the United Nations Convention Relating to the Status of Refugees signed in 1951. Due to temporal and geographic limitations that were incorporated into this convention, a protocol was

[15] For example it is found in the German Basic Law. For an in depth discussion see: Tazreiter, Claudia. *Asylum Seekers and the State*. Burlington VT: Ashgate Publishing Company, 2004 : Chapter Four

agreed upon in 1967 to eliminate such restrictions. For ease, whenever this thesis refers to the Refugee Convention, it will be speaking of both these international agreements, as it views the second merely as an extension of the first. Also, all EU member-states are signatories of both, eliminating possible differences in international obligations.

The major tenet of the Refugee Convention defines a refugee, as already quoted.[16] This might appear straightforward; however this brief definition establishes four fundamental criteria in determining eligibility.[17] Criticism of it has produced requests for the Convention's removal from international law. Many claim it is historically inept as it fails to take into account its modern surroundings. This denunciation comes from both sides. Some say it is too limited as it should be more far-reaching. A regional instrument to compare it against is the African Union's refugee treaty that has enlarged the definition to include groups that are fleeing war-torn areas.[18] Others alternatively assert that due to changes in the contemporary world, such as ease of travel, the expansion of communication channels, and fears about security in relation to foreign nationals, the Refugee Convention is historically defunct. Thus, some nation-states conceive that they need new rules for controlling who is on their territory, which would have far-reaching consequences for refugee rights. Despite these espousals becoming more common, the Refugee Convention is still largely globally accepted and due to the numerous references made by EU institutions, is theoretically the basis of all its asylum legislation.

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[16] Article 1, *The United Nations Convention Relating to the Status of Refugees* (1951).
[17] For a more detailed examination of the refugee convention, see: Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union*. New York: Intersentia, 2004 : 4 and Guild, Elspeth. "'Seeking Asylum': Storm Clouds Between International Commitments and EU Legislative Measures". *European Law Review* 29, no. 2 (2004) : 198-218.
[18] Badar, Mohamed Elewa. "'Asylum Seekers and the European Union': Past, Present and Future". *The International Journal of Human Rights* 8, no. 2 (2004) : 159-174.

The other important principle of the Refugee Convention is that of non-refoulement.[19] This prohibits states from returning anyone who could face persecution.[20] Functioning as a safety net, this point forces the state in question to consider every application to ensure they are not a refugee and are therefore not being returned to face persecution.

Other international treaties exist and although they are of lesser importance, they do play a role in the EU's legislating process. These include other United Nations conventions, most importantly the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Universal Declaration of Human Rights, which holds crucial rights that affect the EU in measures concerning reception conditions. Another international convention is a regional one: the European Convention on Human Rights (ECHR). Upheld by the European Court of Human Rights (EC of HR), article three is of particular relevance, as it prohibits torture. It is in addition to the international treaties already presented because there are no exceptions to it, thus it acts as an extra guarantee to non-refoulement, which has important loopholes. It includes the scenario that no state is allowed to deport or extradite an individual if torture in the receiving state is *likely*. All member-states are party to the Council of Europe so must uphold the ECHR, as their national laws must conform to it. A slightly confusing scenario exists however with the EU. Although member-states are affiliated to the Council of Europe, the EU is not, making national law bound to follow the ECHR, but

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[19] Article 32-33, *The United Nations Convention Relating to the Status of Refugees* (1951).

[20] There are important exceptions to this protection. They include if:
"(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."
Article 1 of *The United Nations Convention Relating to the Status of Refugees* (1951).

not European Community (EC) law.[21] The European Court of Justice (ECJ) however has (to date) motioned in favor of the Convention's principles. If the Lisbon Treaty is ratified, the EU will become a party to the ECHR and therefore the ECJ will be below the EC of HR and hence obliged to conform to its rulings in relation to the ECHR.[22] Finally, also applicable is The Charter of Fundamental Rights of the European Union. Reflecting the emphasis the EU places on refugee protection, article eighteen is entitled *Right to Asylum*, which is significant because although under international law there is no right to asylum (merely to be a refugee), European law will include such.[23] This right is based on the "rules of the Geneva [Refugee] Convention", marking the significance of this to other instruments.[24] Although the focus of this thesis will remain on the Refugee Convention, this discussion has determined that a right to seek refugee status exists in international law through various instruments, and this is acknowledged by the EU and its member-states.

Immigration in post World War II Europe

Political asylum and refugee politics was not always a contentious public issue, instead it only became such in the last few decades of the twentieth century. Immediately following World War II, the international community were united and determined in their approach to combating forces that persecuted individuals. Six years after the war, heads of state met to sign the Refugee Convention, establishing their intentions to aid those in

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[21] When referencing EC law this study is referring to binding legislation passed by the European Union that member-states must adhere to

[22] Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 153
This is significant because the British Court system has ruled that a provision in the Reception Directive (2000/9/EC) conforms to EC standards, but failed to meet the ECHR. Therefore with such a development in a national court, it seems likely that sections of EC law will be challenged via the judicial system. For more on this see: Guild, Elspeth. "'Seeking Asylum': Storm Clouds Between International Commitments and EU Legislative Measures". *European Law Review* 29, no. 2 (2004) : 198-218.

[23] Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union*. New York: Intersentia, 2004 : 12

[24] Article 18, Charter of Fundamental Rights of the European Union, (2000/C 364/01).

need. A number of states codified this obligation into their national constitutions, ensuring its preservation.

On a more general basis, immigration policies across Europe reflected a fundamentally different approach from what is currently followed. States across the continent required more labor than was on offer on their territories in order to re-build their shattered economies. Although the means differed according to the state, the approach was to encourage immigrants to fill the labor demand. The colonial powers focused their energies on their colonies, advertising for workers to come to the *mother-country*, leading for example to France acquiring most of its labor from the Maghreb states. The other countries used different historical links. Germany, for instance, signed a number of agreements with Southern European countries including Turkey to encourage laborers as *guest workers*.[25] An important premise was that these incoming laborers would only be temporary. Whilst the economies were doing well and the demand for a work force was high, it was valuable to have more labor, however when the inevitable downturn occurred, it was assumed that the laborers would return to their country of origin. This assumption was fuelled by the fact that the majority of laborers who came entered as individuals (mostly male), leaving family in the home country to where money would be sent. Thus, communities did not initially develop around the laborers as their requirements did not demand such.[26]

As the economy began to slow in the 1970s, the European states' assumption however was proven unfounded. Laborers were not returning home, instead an alternate movement

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[25] For an in depth discussion on the guest worker schemes see: Tazreiter, Claudia. *Asylum Seekers and the State.* Burlington VT: Ashgate Publishing Company, 2004 : 95-97

[26] Fetzer, Joel and J. Christopher Soper. *Muslims and the State in Britain, France and Germany.* New York: Cambridge University Press, 2005.

was occurring: the arrival of women and children.[27] As families began to arrive, state authorities began to introduce new restrictive measures. Blocking the entry of new laborers, whilst introducing incentives for immigrants to return home, the approach to immigration had shifted to prioritizing control and restriction.

Racist and ethnic violence and tension became widespread, being particularly fierce in industrial urban areas.[28] The rise of this sentiment was also reflected by the growth of the right-wing populist parties who could capitalize using immigrants as scapegoats, portraying them as *the problem* plaguing the state. Even members of the major political parties were drawn into utilizing such polarized language. Although Britain was not a member of the Community at this point, Enoch Powell a British Member of Parliament (MP), infamously predicted race war in a well-known speech when stating, "As I look ahead, I am filled with foreboding. Like the Roman, I seem to see the 'River Tiber foaming with much blood'".[29] Although he was released from the cabinet by the Prime Minister, who refused to accept this as the government's approach, rallies were held in many urban areas under the slogan "Don't Knock Enoch".[30] Governments in the 1970s had to respond to these outbursts of public sentiment, which saw immigration controls spread across Europe in a bid to close the entry door.

Despite these blocking measures however, the number of immigrants continued to grow, with two routes remaining available. The first was political asylum, as by blocking

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[27] Some commentators claim that the shifting approach to restriction actually spurred immigration, as many who may not have chosen to stay, did due to realization that they would not be able to return and thus also elected to bring family over to join them. Another point is that whilst EU member-states were individually debating bringing in such measures, it heightened the concern for those in countries that were going to be restricted and did not have family ties so they opted to move while they could. For more on this discussion and analysis of the early restrictive measures, see: Hayter, Teresa. *Open Borders: The Case Against Immigration Controls*. London: Pluto Press, 2004 : 36-57.

[28] Ibid. : 21-36.

[29] To see the whole of the speech, which attacks immigrant communities and requests immediate action against them, see: http://www.enochpowell.net/speech04.html

[30] Hitchcock, William. *The Struggle For Europe*. New York : Anchor Books, 2004 : 415.

other means of entry, those who were not persecuted but still wanted to enter Europe to better their lives were pushed into this route. Secondly there was family reunification, which did not only increase the official statistics of numbers of people born outside the country because of the arrival of families, but with the arrival of spouses natural increase also occurred. Furthermore, immigrants became progressively more visible, as with family came cultural and religious institutions, along with facilities and stores creating *foreign* communities within a city. This visibility merely fed the populist parties, serving to intensify tension.

Associating themselves with passion-based concepts such as *national identity*, politicians and advocates of this stance could attract widespread support as it was an appeal to emotion. It is not only an easy tactic because it does not necessarily have to be substantiated by fact (as long as the perception exists), but it is also very difficult to counteract as reasoned or fact-based analysis has no resonance over emotion. Painting the immigrant as *the problem*, *the threat*, and *the other* led to a simplistic dividing line. Reducing all the categories of immigrants into one group allowed the idea of national identity to be sharpened, as to define one group, there must be another to contrast it against. Therefore the increased visibility of immigrant communities was a crucial component to the rise of the populist right, as to target the immigrants, the right was able to reassert the national identity of their community, reaffirming its relevance.

Since this shift towards control, the general approach to immigration legislation has not been significantly altered. The idea of reduction has been transferred to asylum, leaving it in a unique position. The primary objective of asylum legislation was to protect the vulnerable but the reality that asylum is the main route into the state encourages

incomers to use it, even if they lack a genuine claim for refugee status. This substantially increases the number of applicants entering, and creates the politically contentious issue of how to tackle the problem of bogus asylum seekers. In order to show an anxious public that action is being taken, politicians responded by initiating more restrictive measures, derogating from the unambiguous statements that declare their all-embracing support to refugees. This pivotal shift, whether officially acknowledged by the governments of Europe or not, is the approach that can clearly be seen in immigration and asylum policies today, and this theme will be returned to throughout the study.

The EU evolution

The EU as it presently exists is a complex regional body that is composed of twenty-seven member-states and a number of European institutions. Its powers and reach, its status as an entity and its ultimate objectives are continuing sources of academic debate. Questions such as whether it is simply an international organization or a weak federalist style government can fundamentally shape how an article is written. Commonalities that feature throughout specific disciplines provoke reactions from those external to it.[31] This essay's determination proceeds from the assumption that the EU is a multi-tiered structure that has not yet met the threshold of a federal government. Member-states still retain a considerable level of authority, in that all regulations must be implemented by the states and the ultimate decision to remain within the Union is possessed by the members.

[31] For example, International Relations scholars tend to view the EU as primarily Intergovernmentalist, meaning that the member-states are *the* central actors and the successes and actions of the EU is dependent on the will of the member-states. Scholars in political science however may accept that the member-states are central actors, would refute this theory by claiming the EU is more than the sum of its members. For instance neo-functionalism is a theory that sees the authority of the EU moving from the member-states to the institutions via a process of political spillover, whereby the actions of member-states can have implications which strengthen the authority of the institutions. For more on this debate, see: Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995. Chapter One

Also, their dominance in the area of asylum until 2004, which will later be demonstrated, has had profound implications on the system's evolution. The institutions are not however entirely reliant on the states and have developed significant prerogative in many policy areas in where they shape measures. Thus, questions will be raised about the true motivations of the states. Although they may appear to be pooling their powers to a higher entity, some scholars actually see this movement as states reinforcing *their* prerogative.[32] In relation to asylum, this contention is fundamental. The gradual power shift that has taken place highlights a clear instance where state preference was reinforced through European activity. This discussion will be expanded when applying asylum to the path-dependent framework in later chapters. Nonetheless, it is crucial to note that this proposition is not considering the movement as zero-sum, securing the importance of the idea that this is a power balance, framing the discussion therefore around how it is tilted.

Initially the union began fairly modestly, as an initiative to integrate the coal and steel industries of six European states, in a bid to secure durable peace. The Treaty of Paris in 1951 signed by France, Germany, Italy, and the Benelux countries sought economic cooperation and security. If all the states' coal and steel industries functioned as one, and were monitored by a regional board, war was made increasingly difficult. In the context of the end of World War II, the cooperation and agreement of former enemies may have been surprising, but having been subjected to two atrocious wars in just over three decades, the need to preserve peace and rebuild the devastated economies took priority.

Continuing integration, the Treaty of Rome (1957) created two additional communities: the European Atomic Community and most importantly the European

[32] For a more comprehensive discussion, see: Bulmer, Simon and Christian Lequesne, eds. *The Member States of the European Union.* New York: Oxford University Press, 2005. Chapter One

Economic Community (EEC), which aimed to establish a common market. The famous quote in the preamble of the Treaty of Rome: "to lay the foundations of an *ever closer union* among the peoples of Europe"(emphasis added),[33] illuminates the idealist aspirations in an ambiguously-phrased statement.

Certainly, if the EU is considered as it currently functions, *closer union* has been achieved. Beginning as three separate communities, focused on economic regional cooperation as a means to securing stability, the EU has assumed significant powers. To achieve a single market, a goal mostly associated with the 1980s due to the Single European Act (SEA) that was signed in 1986, many other policy areas have been drawn under this entity, such as social and environmental policy.[34] A pivotal development was the Treaty of Maastricht (1992), which created the European Union and fundamentally re-organized the structural composition of the entity. The EC became only one section, and was entitled the first or Community pillar. The second and third pillars were created and represented new areas the union had a role in: the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA).[35] This new structural arrangement facilitated the idea of a political union, which had formerly been sidelined by economic integration. It was reasoned however that for comprehensive development to take place, in this latter area, more cooperation on the political level was required. An example can demonstrate this, as for a fully functioning internal market, industry and business had to

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[33] "Treaty establishing the European Economic Community, EEC Treaty - original text". Found at: http://europa.eu/scadplus/treaties/eec_en.htm

[34] The Single European Act agreed in 1986 was the first major revision to the Treaty of Rome (the founding EC Treaty). Not only did it change the decision-making procedure in a number of key areas, it facilitated the path towards monetary union and importantly expanded the EU's influence in social areas.

[35] From this point on for ease, the *EU* will be used to denote the regional entity, regardless of the date. The term *EC law* will continue to be used to specify action taken within pillar one. Also, if at any point the paper refers to the EU (15), this will mean the 15 member-states prior to the enlargement in 2004.

be regulated equivalently, workers rights had to be equalized, internal borders needed to be removed to allow for the free movement of goods, services and people, which then had further implications for third-country immigration. This connection of issues required that the EU have more of a role in these policy areas, which was acknowledged by member-states when they agreed to the Maastricht Treaty.[36]

The asylum policy of the EU is still in its formative phases. The objective is total harmonization of the member-states' asylum determination systems. Crucial developments have seen gradual progress. They included the Dublin Convention (1990), which was created to determine the state responsible for the asylum seeker, and the Maastricht Treaty (1992) that for the first time issued a common framework for asylum legislation. Following this, the Amsterdam Treaty (1997) is a landmark in the evolvement. It transferred asylum into the area of EC law and forged agreement into what minimum standards were to be decided upon. Next were the conclusions of the Tampere Convention (1999) (a Council meeting focused on Justice, Freedom and Security), which first officially highlighted the need for a CEAS. Lastly the Hague Programme (2004) set out a five year agenda in which the second phase of the CEAS should create a common asylum procedure. Other important developments in the process will be discussed when relevant. Although this essay has discussed until the present, the focus of the analysis will

[36] Their recognition of this however was limited by the fact that the governing procedures in the pillars differed substantially. In the First Pillar, supranationalism was the chosen method, which meant a balanced process between member-states and EU institutions. In the Second and Third Pillars however, intergovermentalism was the preferred approach, which placed member-states in a dominant position. An intergovernmental approach would allow member states to have the dominant position as it would mainly enable a framework to encourage state bargaining. The EU institutions therefore played only a small role, as they were not entitled to actively participate. The Supranational or Community Method by contrast balanced the influence of the Institutions. In what is often referred to as the standard community method, the Commission has the sole right to initiate legislation, the EP consults with the Council, the ECJ has judicial review powers and the Council, rather than voting unanimously, votes by a method of Qualified Majority Voting or QMV. The current functioning of QMV stipulates that to pass a measure through the Council, not only must there by a majority of votes, but as the Council had weighted votes, there must also be a majority of countries agreeing and a majority of the EU population being represented. This is to prevent those countries with the larger number of votes teaming up consistently and either passing or blocking measures.

only proceed to the end of phase one, as the significance and impact of what has been agreed upon later cannot be examined well, due to its recent nature.

This contextual section has allowed for a brief overview of the subject in its contemporary setting. Demonstrating the impact of international law, the significance of post-war immigration policies, and movement and the evolvement of the EU, the topic of asylum policy can be seen in its appropriate position facilitating an analysis into the subject.

Path-Dependent Framework

Path-Dependency will be the theoretical framework used to explain how and why the CEAS is being created as it is. Its rigidity and flexibility, although sounding contradictory, allows for a strong base on which to examine the factors that have led to a divergence existing between the desired ideal and the reality. The framework is not merely an advocacy that "history matters" as some scholars have used it for in the past. Instead it accepts this and builds upon this assumption. Not only can the path, also called a trajectory, be useful in accounting for the past, but it can also reveal likely indicators for future developments.[37] Its rigidity comes in the form that a path is established by various factors, which then function as constraining forces on what action can be taken whilst following the path. Treaty obligations, political spillover, the role of EU institutions, European-wide interest groups, and member-state diversity and situation combine to

[37] For more on this, see: Wilsford, David. "Path Dependency, or Why History Makes it Difficult by Not Impossible to Reform Health Care Systems in a Big Way". *Journal of Public Policy* 14, no. 3 (July-December, 1994) : 251-283. In this discussion, he makes the distinction between prediction and forecast very clear as the first term is too strong when thinking in regard to the path-dependent framework

establish the path.[38] Strict adherence to the path is necessary, as the numerous factors enforce how integration and development proceed. The flexibility is added when various events, announcements, and agreements occur to cause a breach in the path, enabling it to change direction. A new trajectory is established with a new combination of constraints ensuring that the new path is followed. Once the path has been followed for a significant period of time, it is often considered too costly to reverse this process, thus establishing both the importance of history, as developments generally are preserved, and the future direction of the path, since the approach is strengthened the more it is observed.[39] The longer a path is pursued, the less likely a new trajectory is to be created.[40] This is because not only do legal obligations play a role in constraining the process, but also norms become established that signify simply *this is the way it is done*. Despite the rigid nature of the path, it is possible for it to shift in direction, allowing an element of flexibility. These shifts however are not common and require that a *conjuncture* occurs to force change. Involved in this shift are both exogenous and endogenous factors, and the requirement of simultaneous impact to some extent suggests why these conjunctures are irregular. Components that determine the trajectories and conjunctures can be divided into five categories. A brief overview of each will suffice to illuminate the basic theoretical framework, which will then be expanded and applied in Chapter Three.

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[38] Paul Pierson in his work identifies four factors that constrain member-states, when he is theorizing that the EU should be seen as more of a multi-tiered form of government than simply an international organization. These are "the autonomous activity of the EU organizations", "the impact of previous policy commitments", "the growing scope and overlap of issues" and the activity of non-state actors". They will replicated and transferred onto the path-dependent framework of this paper. Additionally, one other constraint will be introduced, which completes the categories of constraining factors that serve to determine the path the EU must take. For more see: Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995 : 10-14

[39] Hanson, Randall. "Globalization, Embedded Realism, and Path Dependence: The Other Immigrants to Europe". *Comparative Political Studies* 35 (2002) : 259-283.

[40] Wilsford, David. "Path Dependency, or Why History Makes it Difficult by Not Impossible to Reform Health Care Systems in a Big Way". *Journal of Public Policy* 14, no. 3 (July-December, 1994) : 251-283.

Previous Treaties [41]

Treaties that have formally been agreed can be great impediments to action, as decisions that have been made require compliance. Former governments that held potentially different views and priorities could have negotiated for a position that limits beneficial action in an area. Examples include decisions establishing the legislative method given to an area. For instance, if intergovernmentalism is chosen as the appropriate approach, the EU institutions have very little ability to act, creating the scenario that less is likely to be achieved. New governments therefore may view this as an impediment to action. However if the Community method is decided upon, then the power of the Council is diminished as votes are no longer unanimous but subject to Qualified Majority Voting (QMV). The European Parliament (EP) gains significantly, as does the Commission, and the law is under the jurisdiction of the ECJ. If this was the chosen method, a new government might interpret this as a former loss of influence, yet one that is enormously difficult to reverse.

Spillover and Issue Density [42]

Spillover happens when a central issue acted on by the authority has consequences (both intended and unintended) on another policy area. It is a constraint because if that area was formerly known to be in the member-state's domain, it limits the states' ability to fully control future action. Issue density is related to this as it is a consequence of many areas being under EC law. The more that is under the EU (and with spillover, more will be under it) the more member-states have to preserve their position as informed

[41] Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995 : 10-14
[42] Ibid. : 10-14

actors. Often member-state governments do not have the time or the staff to read every document plus the available information on the subject, which would allow them to analyze the approach, impact, reach, and consequences of the proposed measure to decide their stance. Therefore, many measures are either rubber-stamped or approved without understanding the full implications, which potentially leads back into spillover, creating a cyclical movement maintaining a gradual increase in new policy areas falling under the domain of the EU.

European Union Institutions [43]

The EU institutions have developed into powerful entities over the decades. In regard to the Community method, the Commission has gained power, being the sole initiator of legislation in a number of new policy areas.[44] Having the ability to control the agenda however is not its only power.[45] There greater knowledge of the policy process combined with their ability to pressurize and influence member-states, prevents the Council from acting in a united fashion against the Commission.

The EP since 1979 has become the only institution that is directly elected. As such, many see it as the institution with a mandate. It is acquiring more powers, as prior to the development of the Community method they could merely voice an opinion. With this shift however, they are now a functioning part of the process as they have co-decision status with the Council in many areas. The ECJ established during the 1960s and 1970s central principles that assure their role in the Community law proceedings. Ruling in

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[43] Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995.

[44] For an explanation on the two central policy methods, see footnote 36 from this chapter
The Community method began with the SEA (1986), and the list has enlarged in all the major treaties since.

[45] For more on the Commission's powers, which includes "manipulation of the Council's default position" and "the ability to change the preference of member-states", see: Schmidt, Susanne K. "Only an Agenda-Setter?: The European Commission's Power over the Council of Ministers". *European Union Politics* 1 (2000) : 37-61

favor of *supremacy* for EC law determined its effect over national law. They also declared the notion of *direct effect*, which establishes that when clear legal specifications are drafted into law by the Council, member-states are unable to choose not to implement them, as EC law apply to both states and their nationals.[46] The rulings advanced the role of the ECJ in terms of judicial review. Other powers they have developed include settling disputes between institutions and/or member-states and examining EC law's legality.[47] With increased roles, the policy route of EC legislation has significantly changed from intergovernmentalism, when member-states dominated the process.

European-wide Interest Groups [48]

Non-Governmental Organizations (NGOs) present another actor within the policy process. Many of these groups are now bypassing the national governments and establishing transnational groupings in Brussels to lobby the EU institutions directly. This reflects the sentiment of where the *real action* takes place. If the major decisions are to happen in Brussels now, why direct resources towards European capitals?[49] This sentiment is merely extended due to the phenomenon of political spillover.

Member-State Diversity and Situation

The final constraining factor addresses the member-states, which as already noted have substantial power in the process. With twenty-seven member-states vying to have their say, the EU is a diverse mixture. The simple yet crucial fact to mention is that each

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[46] Supremacy ruling: *Costa* v. *ENEL* (1964) Direct Effect ruling: *Van Gend en Loos* (1963) For more on these see: Dinan, Desmond. *Ever Closer Union: An Introduction to European Integration.* Colorado: Lynne Rienner Publishers, 2005 : 292-3

[47] Baldaccini, Anneliese, Elspeth Guild and Helen Toner, eds. *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy.* Portland Oregon: Hart Publishing, 2007 : 86

[48] Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995 : 10-14

[49] Ansell, Christopher and David Vogel. *What's the Beef? The Contested Governance of European Food Safety.* Cambridge, MA: The MIT Press, 2006.

member-state has its own cultural and historical legacies that must not be overlooked. These differences produce basic divergences in opinion, which add to the difficulty of reaching agreement. This is particularly (though not solely) in relation to areas that are governed by unanimous decision-making. Furthermore, the political situation on the domestic front can impact the approach or position that a state takes on an EU matter. For example, in Germany at present, Angela Merkel is in a politically weak position, as the leader of a Grand Coalition she must lead a fine balance in many policy areas, not permitting her to implement any large changes. But as many commentators have noted, she has embraced the EU enthusiastically as a cause that she can pursue.[50] Although a generalist situation, it does illustrate how a leader can respond to domestic circumstances on the EU front. In specific areas, the domestic scenario can affect the approach in similar ways.

A Conflict Between the Ideal and the Reality

Having established these foundations, the previously highlighted distinction between the EU's self-conceived notions of itself and the reality that it is fundamentally adding to a refugee's ordeal because of the conscious effort to restrict access to their territory is the challenge this paper seeks to address. While significant progress in producing a CEAS has been made, problems however remain within the current functioning of it. Although human rights are avidly espoused with every development, reflected by the frequent

[50] "Germany's government: A Coalition of the unwilling". *The Economist*. (September 6, 2007).

references to the 1951 Refugee Convention,[51] progress in integration does not necessarily equate to progress that observes basic humanitarian standards. This thesis contends that the current workings of the CEAS are harmful to the well-being of refugees. The claim that crucial developments have been made on a European level to harmonize asylum determination systems is unquestionable. However the assertion that this development has occurred to produce a balanced and fair system is far from clear. Why is progress being made in the creation but not the orientation of the system? Put another way, this paper wants to challenge why the ideal that is so aptly *recognized* is not being *realized.* Appreciating that the term *progress* is ambiguous, as it is difficult to pinpoint both for analytical purposes and evaluation, it must be clarified that this paper is utilizing it in a multi-dimensional manner. Basic progress will refer to structural or institutional evolution. Then on a deeper level, the content of what is being created will be examined to determine its success in fully adhering to international refugee obligations.

To explain why there is a divergence between the ideal and the reality, this thesis will employ a two-fold approach to comprehensively examine the CEAS. First, Chapters Two and Three will endeavor to reveal, in a two-tier process, why and how the system is being created. The multiple explaining factors will be put forth in a multi-level format to expose the range of reasons and their sources, stressing the importance of the individual layers. It will reveal the significance of both endogenous and exogenous factors that originate from international causes, EU action, reasons from individual member-states, and underlying triggers. It is only when all these factors are taken into account that the system can be explained. This will then be complemented when the factors are placed

[51] Badar, Mohamed Elewa. "'Asylum Seekers and the European Union': Past, Present and Future". *The International Journal of Human Rights* 8, no. 2 (2004) : 159-174.

into chronological order to observe the overlap and interaction of the various levels. Placed into order, a path-dependent model can be employed in Chapter Three to explain that the CEAS is a product of the trajectories that the EU followed, which were determined by the interaction of the factors presented in Chapter Two. Three trajectories will be outlined that illuminate the period prior to the Maastricht Treaty, the time between Maastricht and the Amsterdam Treaty, and then post Amsterdam. This will establish the foundations of the paper, illustrating that the amount of structural progress has gradually increased throughout the trajectories, due to the changing institutional and events-based constraints of each path, and their simultaneous alignment with member-state preferences. Therefore it is not the states that are consciously leading the process, but instead the positioning of the factors that are supporting their priorities. The reality of what has been created will have been explained.

The second half of the thesis will concentrate on a content-oriented analysis. By focusing on what the asylum related measures involve, with some consideration to the negotiation process, this will combine with the former analysis of the constraints inherent in the path to explain why the ideal objective was never reached. The equilibrium of the constraining forces within each trajectory has made the ideal unreachable, due to the balance consistently favoring state prerogative and not refugee rights. International law has ensured that states continue to protect refugees, but the culmination of forces in the opposing direction has assured that state concerns are prioritized. The current environment, institutional and precedent constraints have established the path moving in the direction of the concept of immigration control, rather than human rights concerns. If

this is set to continue, which the path dependent model this paper utilizes suggests it will, the humanitarian implications for refugees are grave.

Finally, Chapter Five will elaborate on the idea that the EU has lost its humanitarian focus by illuminating the difficulty refugees have in acquiring European protection. Although the EU is currently harmonizing its legislation, the existing divergences between member-states are striking due to the nature of harmonization. The method used by the EU is to establish standards and definitions, which member-states must adhere to, creating the scenario that all procedures and rules are those of each member-state as long as they are located within the boundaries of what the EU standards consider acceptable. The importance of national law therefore cannot be underestimated when considering refugee experiences. To provide an insight into what the EU's harmonization can potentially signify therefore, this thesis will turn to a case study to highlight the impact of the CEAS. It will reveal the full range of barriers that exist to hamper a refugee's chances of being recognized as such.

When choosing a case study, a number of difficulties arose, as no state can represent all the member-states due to the enormous distinctions that exist across the contemporary EU. For instance, some states have been significantly more affected by asylum seekers, some states are larger, some have more generous welfare systems (creating what they perceive to be a magnet-like effect), some have simpler procedures, some are easier to access, citizen laws and systems vary widely, and divergences in historical experiences produce other disparities. However, due to limitations, this paper has chosen to focus on one state. This will enable a comprehensive demonstration of a functioning asylum

determination system, in order to reveal what the EU's measures allow within the boundaries that they perceive to be fully adhering to international law.

For the purposes of this thesis, the United Kingdom (UK) has been chosen, as despite all the implemented restrictive control measures, the UK currently receives more applicants than any other member-state.[52] Certain obvious problems arise from such a choice, most importantly, Britain is not a full participatory member of all EU-initiatives. Britain has however opted-in to all the existing asylum measures, and although it retains its own border control, since not a member of the Schengen zone, it has been affected by the removal of the internal borders on the continent, as this paper will demonstrate.[53]

There are a multitude of issues relating to the establishment of the CEAS, ranging from the wide scope of immigration, to efforts of integrating Justice and Home Affairs to external relations, to attempts to enhance efficiency in EU policy-making. This paper, due to its focus, had to avoid a number of topics that could be considered relevant. Differences between member-states will not be treated in great detail, instead using examples of variations and broader generalizations where possible. When presenting this argument therefore information has been omitted due to the prioritizing nature of the research collection.

[52] Hatton, Timothy. "Seeking Asylum in Europe". *Economic Policy* (April 2004).
[53] The Schengen Agreement was signed in 1985 by France, Germany, and the Benelux states in a proposal to eradicate internal border controls to fully allow the free movement of goods, services and people. This was in response to European integration moving frustratingly slowly. By the time it was implemented in 1995, all the member states had joined with the exception of Britain, and Ireland.

Chapter Two: Why Create a Common European Asylum System?

In 1991, during the negotiations of the Maastricht Treaty (1992), the need to coordinate in the policy area of political asylum was officially recognized when it was decided it would be inserted into the third pillar, or the Justice and Home Affairs pillar, establishing it to be under an intergovernmentalist capacity. Realizing the necessity to work together therefore at this stage did not mean a significant pooling of powers to the EU, effectively and substantially reducing the role of the member-state. Having only produced a limited amount, this mistake was noted just five years later when the Council discussed plans for (what would become) the Amsterdam Treaty (1997). The area of asylum was thus to be moved to the first pillar, where the EU institutions would play a larger role. To secure such a transfer of power however, a compromise was reached when the Council agreed to a five-year transition period where intergovernmental features continued to function, despite the theoretical shift to the Community method. This stage was to be the context of when the foundations of the CEAS would be agreed, as not only was a five-year transitional period established but this five-year deadline coincided with when the determined criteria had to be approved.[1]

The Tampere Conclusions (1999) tried to re-establish momentum that was lost shortly after the Amsterdam Treaty had been agreed. It called for a comprehensive Common European Asylum Policy, with the agreed targets planned at Amsterdam, to be only the

[1] COM(2005)184 final, The Hague Programme: Ten Priorities for the next five years

first phase. The Hague Programme (2004) again reasserted the need for a CEAS and set the agenda for the second phase of measures with completion aimed for 2010. This will include a "common procedure and uniform status for persons benefiting from asylum or subsidiary protection". Additionally, further assistance and cooperation is to be anticipated in working with third countries, in particular those states that tend to be large producers of refugees and bordering countries to the EU. Thus within a decade, there was a reversal in thinking in how to solve refugee issues in the EU. The questions this chapter wants to engage is why there was such a change in opinion? What factors contributed to the changing views? Explaining this is a very complex task due to the complicated nature of policy-making within the EU. Many layers of explanation overlap and interact with each other, which makes ascertaining the key causal factors and their association to the success increasingly difficult to define. To fully comprehend why the system is being created, this chapter is divided into four sections to explain the critical reasons in the context of their origination. This will serve to illustrate the difficulty of the EU's legislating route. The four categories that will be examined are *underlying factors*, *international triggers*, *European Union actions*, and *member-state reasons*. This will not only stress the number of important factors, but also reveal the number of levels that are operating and influencing each other to produce change that is ultimately leading to the creation of the CEAS. Thus the complexity of the path will be illustrated, which will be the focus of the next chapter.

Underlying Factors

The four contextual factors presented in this paper are paramount to the creation of the CEAS. The first is the Refugee Convention. As determined in Chapter One, all EU member-states are signatories of this and it underlies the basis of European asylum policies. To emphasize the importance the EU places on this international obligation, all applicant countries are required to sign and implement it prior to accession into the Union. Obligations to humanitarian rights therefore based on this convention are key (at least in theory) when explaining the emergence of the CEAS.

The generalized overview of post-World War II West European immigration policies also from the first chapter is sufficient to explain what occurred in most of the EU (15). An additional point is the vast differences between the EU (15)'s asylum policies prior to the early 1990s. Variations stemmed from many different causes including colonial legacy and ties, welfare systems, and proximity to source countries. Before 1993 however, as a void issue on the regional level, in the context of a less active EU it did not enter onto the community's agenda, only becoming a prominent issue in the member-states in the 1980s. The restrictive approach that was now common across the EU in regard to immigration was transmitted to the issue of asylum, effectively causing states to favor what were traditionally considered immigration resolutions, such as border control, to use in regard to asylum legislation.

The third contextual factor is the economic recession of the early 1990s, which had powerful consequences for the development of asylum policy and can be connected to the former contextual factor. The slump, which extended the social problems of

unemployment, and frustration and distrust in government also created a lack of enthusiasm for further European integration. This sudden shift in focus from that of the EU to domestic concerns, had a significant impact on asylum policy. With a political focus that had turned inward to concentrate on domestic issues, asylum seekers were seen as *outsiders* and therefore *out* of the boundary of importance. Restrictive measures can also be accounted for by this, which resonated well with the electorate.[2]

Finally, perhaps the most obvious underlying cause when explaining the need for a CEAS is the number of asylum seekers entering the EU. Clarification however is necessary when determining the facts from the myths. The number of asylum applicants has risen dramatically in the final third of the twentieth century. In the late 1990s, it was twenty times more than in the early 1970s.[3] However facts like this can obscure important patterns and variations and allow for perceptions to be inaccurate. The number of asylum seekers entering the EU is not locked at an ever-increasing rate. The peak year of applicants was 1992 and since its initial decrease, the number has risen again but it has not surpassed that year.[4] Variation between member-states is also an important factor. In the early 1990s, Germany was by far the main receiver, since then however the restrictive policies implemented have had a significant impact in reducing the number of applicants. A reversal of this situation can be seen in the UK, where in 1992 it was 32,000 and yet by

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[2] Simon, Rita and James Lynch. "A Comparative Assessment of Public Opinion toward Immigrants and Immigration Policies". *International Migration Review* 33, no. 2 (Summer, 1999) : 455-467 and Saggar, Shamit. "British Public Attitudes and Ethnic Minorities". *British Cabinet Office*: http://www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/strategy/british.pdf

[3] Hatton, Timothy. "Seeking Asylum in Europe". *Economic Policy* (April 2004) : 7

[4] Ibid. : 9

1999 the numbers had reached 100,000.[5] Although the actual number does matter and will have an impact on the policy-maker, other factors are also crucial including public perceptions and the resulting pressure on the government based on these understandings, plus action taken by opposition parties, particularly those on the right, which can and often do have significant leverage in framing the debate.

International Triggers

Events on the international stage produced crucial triggers that directly affected the development of the CEAS. The four main ones that provide important explanations, will be chartered to illustrate the significance of global events on EU policy. In 1989, the Communist bloc began to disintegrate, which anticipated the end of the Cold War. In terms of asylum this had massive consequences, as in 1989 there was a flight from the East of one million people.[6] Countries most affected by this were those that shared borders with the eastern bloc. As already stated, Germany was the main receiver of asylum seekers in the first half of the 1990s. With borders that had formerly been controlled and staunchly upheld by the governments of the Eastern European states, the EU members in close proximity to the East suddenly were introduced to a great influx of people. This did not end in 1989 however, as the flow of people out of the former bloc continued, as more and more states overthrew their Communist governments. The only change was the increase in the number of source states. In 1991, Italy experienced entry of huge numbers of illegal immigrants coming from Albania, across the Adriatic Sea.

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[5] Spencer, Sarah, ed. *The Politics of Migration: Managing Opportunity, Conflict and Change*. Blackwell Publishing, 2003 : 35

[6] Collinson, Sarah. "Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe". *Transactions of the Institute of British Geographers* 21, no. 1 (1996) : 76

Seen as a *crisis*, the end of the Soviet bloc had huge consequences on asylum policy in the EU (12).[7]

Violence in the former Yugoslavia was significant in a number of ways. The wars that plagued this former state were the first to be fought on the European continent since the Second World War. This had a powerful and symbolic impact on many Europeans who were not only affected by the violence but also their proximity to it. After all, the region was considered to be on the EU's *doorstep*. Deeply moving for EU citizens however, the shock did not encourage them to urge their governments to graciously accept large numbers of the refugees that the conflicts produced. It merely heightened their sensitivities to the issue in the context of the already present national debates.

The Bosnian War of 1992 is infamous to many Europeans for producing a refugee influx. Asylum determination systems were already struggling under the impact of the end of the Cold War. The consequence of this influx resulted in the European systems collapsing under the pressure, as they had not been designed to process such large numbers of applicants. Calls for burden-sharing, particularly from Germany, were not met. One response of the EU was to call on member-states to electively accept refugees under the more temporary status of subsidiary protection. Most states took in minimal numbers, which produced its own range of problems as Randall Hansen points out. Temporary protection is rarely that, and at the end of the war in Bosnia, a return to their homeland was only partly adhered to.[8]

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[7] Collinson, Sarah. "Visa Requirements, Carrier Sanctions, 'Safe Third Countries' and 'Readmission': The Development of an Asylum 'Buffer Zone' in Europe". *Transactions of the Institute of British Geographers* 21, no. 1 (1996) : 76

[8] Spencer, Sarah, ed. *The Politics of Migration: Managing Opportunity, Conflict and Change*. Blackwell Publishing, 2003 : 31

The Kosovan Refugee crisis in 1999 was very different in nature. Due to the violence and atrocities inflicted during the war, refugees again were a very prominent issue, as they were not merely a result of the war but had been a calculated target. In attempting to escape persecution, many Kosovans traveled to the Macedonian border. The Macedonians who had a very delicate ethnic balance denied the refugees entry, despite calls from many NGOs to do so. The lack of response from the EU demonstrates that nothing substantial had changed in regard to contingency plans. The EU's slow reaction to this crisis, according to Michael Barutciski and Astri Suhrke resulted in the US playing a large role in solving the dilemma of the stranded refugees.[9]

The last international event to be considered is different from the perspective that it is outside of Europe. The terrorist attacks on the US on September 11, 2001 (9/11) on the World Trade Center and the Pentagon had repercussions throughout the world. To focus on how this could affect European Asylum policy, the crucial link is between asylum seekers and illegal immigrants. To apply for political asylum, the individual must be on the state's territory. This requires an asylum seeker to travel from their home to the EU country. Due to the restrictions implemented to hinder entrance to the EU however, it has become increasingly difficult for refugees to gain access. Consequently, it has become more common for refugees to enter illegally so they are able to apply for asylum. Illegal immigration however can also be importantly connected to crime, drug and arm smuggling, and terrorism. In the context of 9/11, many policy initiatives focused on restricting illegal immigration to prevent security breaches. This was to have a negative impact on refugees who were attempting to reach the EU, due to reasons including mixed

[9] Joly, Daniele, ed. *Global Changes in Asylum Regimes*. Palgrave Macmillan Ltd., 2002 : Chapter Four

migration. It was also to have an impact on asylum policy as the balance between humanitarian ideals and security would be tipped in favor of the latter, making policy increasingly restrictive. The more general consequence of 9/11 was undoubtedly to place all these issues at the center of the agenda, making sure that the already politicized topics remained, and were enhancingly made, more salient.

European Union Actions

The EU as an institutional actor played a key role in the creation of the CEAS. The first two triggering factors to be addressed are in the form of political spillover. Thus, important actions of the EU that were effected with little regard to the idea of a common asylum system, started the process of forcing both European member-states and the EU itself to adjust policies in that area. The first was the Schengen agreement of 1985. This was an arrangement where the five original countries of the EU, excluding Italy, agreed that they would abolish internal borders and create a common zone. It was extended to Italy in 1990, followed by a gradual inclusion of other member-states in the years after. The second agreement was the Single European Act (1986) that provided freedom of movement for both EU goods and citizens. With these important developments member-states were forced to think of the implications in other policy fields. For example, external borders of the Schengen zone would have to be tightened to prevent uncontrolled third-country immigration. Importantly, in terms of this study, the movement of asylum seekers would have to be monitored. Reasoning for this foresaw the need to prevent abuse of the national systems, which is usually referenced as *asylum-shopping*; a practice

that envisages asylum seekers filing multiple applications across the EU.[10] Policy had to be coordinated to resolve such challenges that would surface with the implementation of the acts.

The Maastricht Treaty of 1992 was a turning point in EU history, when it quite conclusively restructured the political aspects of the Union. The two new pillars were to be governed through an intergovernmental approach. This was significant for the issue of asylum, which was put in the third pillar as it meant that the EU institutions at this point would have a limited direct role in its development.

This however was transformed just five years later under the Amsterdam Treaty when the issue of asylum was moved to the Community pillar. Member-states were not fully prepared to relinquish all power immediately though, as they established the transitional period where they would still perform an important role. The EU institutions did however gain new duties, notably the Commission who were able to start initiating legislation, plus calling on member-states to fully implement the already established principles. One of their approaches was to make use of scoreboards and evaluations, which it was hoped would give member-states impetus to uphold their responsibilities.[11]

The last significant impact of the EU has been enlargement. In 2004, the EU expanded from fifteen member-states to twenty-five, allowing ten Eastern and Southern European states to accede; an unprecedented growth. As part of the accession negotiations, all the candidate states agreed to adopt the full EU acquis and signed to become members of

[10] For more on *asylum-shopping*, see Chapter Three of this study

[11] This approach taken by the Commission established a practice where they would evaluate state implementation of EC law and report their findings. Score boards are considered to be an effective visual summary that compares and contrasts member-state efforts and are intended to pressure states into applying the measure in question, as the idea of coming last on the scoreboard is not an acclaimed position.

both the common currency and the Schengen zone. Implementation of these two European initiatives were to be dependent on when the European Commission determined they had reached the criteria to join.[12] This raised concern in the EU (15) that the new countries would have inferior external border control, and therefore introduce weak points, resulting in de-stabilizing the whole zone. With rising fear focused on security, urgency on the issue rapidly increased to place asylum and illegal immigration legislation as a high priority.

The role of the EU and the impact of its decisions have only directly affected the creation of a common asylum system since the Amsterdam Treaty and more decisively since 2004, when the transitional period from intergovernmentalism to supranationalism ended. It would be wrong however to presume that prior to this, the EU was not an important actor. By establishing acts in other areas, the far-reaching implications (both intended and unintended) produced change in a variety of other fields.

Member-State Reasons

The final group is member-states and their central role in the creation of this system. Initially, official European harmonization, pre-Maastricht, was undertaken via an intergovernmental approach, which suggests that, although meeting under an EU front, it was the leaders or the politicians of the member-states that were effectively negotiating. An examination prior to this official harmonization however highlights important developments that are often missed by those insistent on focusing on an EU-led discussion. Also, what this section wants to demonstrate is another important role of

[12] The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia joined the Schengen zone on the 21st of December, 2007. The three member-states that were not yet deemed ready were Bulgaria, Cyprus, and Romania.

states not under EU auspices, but rather in bilateral agreement. This paper will analyze the idea of member-state action from two separate but connected approaches. Firstly the indirect impact of occurrences and perceptions from within states will be presented to illustrate the pressures exerted on national governments, then the actions of the governments will be considered to demonstrate their direct role in the development of the CEAS.

An exploration of the key aspects of the socio-political environment will enable an understanding of why the policies were enacted. There are three main forces that interact in society to construct political thought and social norms: the media, the political elite and public opinion. A brief consideration into each of these will reveal how the political climate has been shaped in regard to asylum seekers.

The publics of the EU like any other group of citizens gain their knowledge from their political elite and the media. Hence, how issues are presented by these two groups significantly accounts for explaining the public perceptions and opinions. Having helped define opinion, the government is then the receiver of public pressure and should act accordingly. This two-way interaction is what this section intends to examine when deciphering what role public sentiment plays in determining asylum policies on the national and European stage.

The media is an important actor in society that plays a crucial role in the dispensing of knowledge. It is often cited by political scientists as having an enormous impact on public opinion.[13] This is particularly notable in relation to issues that are generally

[13] Koser, Khalid and Helma Lutz, eds. *The New Migration in Europe: Social Constructions and Social Realities.* London: Macmillan Press Ltd., 1998 : Chapter Nine

misunderstood, such as political asylum. The public's perceptions on such problems and policies are penetrated by much confusion, giving the media significant framing capabilities when deciding how to present the story. It is unlikely that the public would be able to extract facts from inaccuracies. There are three common tactics that are used by much of the media, which stunts discourse and perpetuates fear and prejudice. The first is the use of scare tactics. Particularly in tabloid newspapers, expressions such as *flooding* and *swamping* often characterize asylum seeker movements. Public opinion already believes there are too many immigrants in their state.[14] Thus, fears that are already held by the public are exacerbated by headlines such as "Flood of asylum seekers: Asylum Seekers are flooding into Britain at the rate of one every four minutes".[15] Broadsheets too impact public opinion and although may not be quite so unsubtle as the tabloids in their use of arousing fear or concern, they certainly seem intent on spreading a form of anxiety. A study by Ron Kaye demonstrates that merely by using ambiguous terms and framing the debate in a certain suspicious prose, the reader is *socialized* into questioning the "genuineness" when hearing the words *asylum seeker* or *refugee*.[16] Connected to this are the images that are crucial to the politicization particularly in relation to illegal immigration. The terribly dangerous boat journeys that some immigrants take to enter the EU are well-publicized examples of this, lending impetus to the already present notion that European states and the EU are incapable of preventing illegal immigrants from

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[14] Simon, Rita and James Lynch. "A Comparative Assessment of Public Opinion toward Immigrants and Immigration Policies". *International Migration Review* 33, no. 2 (Summer, 1999) : 455-467.
[15] Wooding, David. "Flood of Asylum Seekers". *The Sun.* (30 November, 2002) Found at: *http://www.thesun.co.uk/sol/homepage/news/article140884.ece*
[16] Koser, Khalid and Helma Lutz, eds. *The New Migration in Europe: Social Constructions and Social Realities.* London: Macmillan Press Ltd., 1998 : 178

entering.[17] Linking this to the Schengen Agreement is helpful in explaining why asylum is so politicized across the EU. Once an illegal immigrant has entered the territory, they are capable of moving seamlessly around. This is seen as a problem even in states that are not in the Schengen zone, as the immigrant can easily reach the neighboring state so must merely be smuggled across one international border. Images for example of immigrants entering Italy on boats therefore are relevant across the EU, not just Italy.

The other tactic, which promotes widespread confusion and subsequent ill-feeling, is through the complex web of terms (discussed in Chapter One) that despite having specific meanings are used interchangeably. These terms are not clarified but misused by the media, simplifying a complex problem, which generates a narrow discourse, sustaining prejudice among the public. Thus, with this in mind, the linkage between the truly needy and those who have arrived merely to better their lives allows a partial explanation for why the citizens hold such a negative perception.[18]

The political elite also use these terms incorrectly as a tool to support their rhetoric and to perpetuate the confusion of a salient issue. To call for tighter regulations to reduce the number of illegal immigrants would be to a politician's advantage, as few people would challenge this idea. The use of the term illegal immigrant does not imply to mean asylum seekers and therefore, potential-refugees, which if it did would substantially change the meaning of the policy suggestion. It should include them, of course, because asylum seekers who have to respond to the restrictive measures are mainly forced to enter illegally. Hence, what the politician is calling for (whether he is aware of it or not), is a

[17] Nickels, Henri Charles. "Framing Asylum Discourse in Luxembourg". *Journal of Refugee Studies* 20, no. 1 (2007)
[18] Whittaker, David. *Asylum Seekers and Refugees in the Contemporary World.* New York: Routledge, 2006.

measure that will, in all likelihood, ultimately block some refugees from entering. But because of the simplified language that is employed, this fact generally passes unnoticed and unchallenged, significantly curtailing the political debate. Calls for increased restriction are a standard in member-state politics. An undesirable position for politicians is to be considered *soft* on immigration. This creates the situation where generally there is a consensus that transcends the major political parties, which has the implication that the public discourse will be dominated by a one-sided interpretation. This is merely exacerbated by the rise of the right-wing populist parties that pressurize the elite to move to the political right on these issues, for fear of being attacked. This movement consequently sustains this stunted debate, as there are no key actors left to challenge this discourse.[19]

Another strategy of the political elite is to use statistics, which although might be simply a reflection of modern politics, is also a method that denies inquiry into the human dimension. By bounding ambiguous terms in a statement that supports its assertions with numbers, the idea of human suffering is lost, the obligations to the Refugee Convention are minimalized, and the means to obtain the ultimate goal of reduction are advanced, by using an abstract number to represent the success or failure of a policy. This de-humanizing helps politicians score political points with the electorate, as the real challenge of helping the vulnerable is not the issue – what is, is simply to reduce a statistic. As a Conservative party Member of Parliament in the UK when discussing asylum policy and attacking the Labour Government's approach stated, "We have learned

[19] Other actors that challenge this discourse include NGOs, but when considering their impact, he cannot be viewed on the same level as the forces presented in this discussion. For more on their role, see:
Tazreiter, Claudia. *Asylum Seekers and the State*. Burlington VT: Ashgate Publishing Company, 2004 : Chapter Six

and continue to learn from other countries which have managed to cut asylum applications".[20] Clearly her objective would be to simply reduce the number of applicants in the asylum determination system, thereby not painting a favorable picture of the asylum seekers that are entering the country. Hence, governments are promoting the idea that the asylum seeker is *the problem* that is unwanted, having implications on the notion of the refugee. Statistics released by the governments also reiterate this notion as the quoted rejection rates of applicants is usually high. In 1999, three-quarters of asylum seekers were denied refugee or subsidiary status in the EU.[21] With the balance being in favor of the rejected applicants, and if one assumes that government procedures are fair, which in public debate it is generally considered they are, the asylum determination systems of Europe seem to be more than half filled with bogus applicants who are abusing the system. Although a quarter of applicants, according to the, data are genuine, the tarnished image they receive due to the high rejection rate has already implicated them.

The public's two main sources of information have been described independently of their interaction with public opinion. The analysis has suggested a narrow discourse is presented to the public through processes of simplification of a complex issue, de-humanizing the problem and perpetuating established concerns using scare tactics. The public however is not a passive body, but contributes to this process. Both the media and the government, due to financial and electoral motivations respectively, are susceptible to public opinion. For instance, community outbursts whether in the form of violent attacks

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[20] Widdecombe, Ann. "Ann Widdecombe's speech in full". *BBC*. (6 October 1999). Found at: http://news.bbc.co.uk/2/hi/uk_news/politics/467067.stm

[21] Dunkerley, David and others. *Changing Europe: Identities, Nations and Citizens*. London: Routledge, 2002 : 89

or electoral results are fairly common, as consternation of the prospect of including them in society is pervasive. An extreme example was on April 21 2002, when Jean-Marie Le Pen, leader of the Front National, beat the leading socialist candidate Lionel Jospin and faced the incumbent President, Jacques Chirac in the second round of France's Presidential election. This upset victory sent shock waves through the European political elite as the magnitude of an openly racist and anti-immigration politician accomplishing this feat in French politics was widely unpredicted. It was however not a victory that really came out of nowhere as some contemporaries suggested. Le Pen and his party had been gaining in polls since the 1970s and since the mid-1980s had gained a steady base of support. Also in other European states, right-wing populist parties were gaining political backing. This was not necessarily on the national levels but even regional power sent clear messages to the governments about their public's opinion, forcing immigration issues to the center of the political debate.[22] Thus, this circular motion of inaccuracies and simplifications expressed by the elite for personal and financial gain, combined with a mixture of ill-tolerance and limited awareness in public perceptions, serve to explain the political environment in the member-states of the EU.

Turning to the states as actors on the regional stage, it is important to reiterate that restrictive policies in member-states varied widely throughout the 1990s. General similarities however can be noted, particularly in relation to concepts such as *first safe country*.[23] "Sub-regional harmonization" can be used to explain this. According to

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[22] Far right movements have gained momentum in Austria, France, Belgium, and Italy. For more see:
Ignazi, Piero. *Extreme Right Parties in Western Europe*. New York: Oxford University Press, 2003

[23] *Safe first country* or *safe third country* are terms that denote countries an asylum seeker has transited across that have been deemed safe, indicating that this is where they should have remained and applied for asylum. For more, see Chapter Five of this study

Rosemary Byrne et. al., a level of harmonization had begun in various sub-regions.[24] By taking the example of Germany, many of the policies they enacted were replicated in Hungary and Poland. The reasons behind this copycat approach revolved around the fear of being a *closed sack* or a *soft touch*. States that have neighbors that enact restrictive policies are then concerned that the asylum seekers that cannot enter that state will be deflected to them. This creates a "rippling effect" where states restrict asylum, which encourages their neighbors to follow suite and so on.[25] This argument certainly does not take into account EU actions, but emphasizes the unintended harmonization that member-states effected.

The other major input of member-states were the bilateral agreements that they entered into. The most common were the readmission pacts, which were agreements made between an EU member-state and an external state. They were designed principally for EU states to be able to send foreign nationals back if their asylum claim was rejected. These were significant for states with large numbers of applicants who wanted to show their citizens that they were reacting to the problem.

Other important bilateral agreements include agreements between two states on a particular issue. One example would be the agreement between France and the UK when the Sangatte reception center in the North of France was causing problems as immigrants were regularly attempting to travel across the English channel. This challenge was

[24] Byrne, Rosemary and others. "Understanding Refugee Law in an Enlarged European Union". *European Journal of International Law* 15 (April 2004) : 355-385.
[25] Byrne, Rosemary and others. "Understanding Refugee Law in an Enlarged European Union". *European Journal of International Law* 15 (April 2004) : 355

addressed by two member-states in private negotiations, suggesting again a key role for national governments in the policy field of asylum.[26]

Having considered the explanations in four categories, this paper has been able to describe these factors in some depth. Its multi-level approach has emphasized the important role actors and events from different layers play, when attempting to explain how systems, policies, and agreements emerge in the EU. To ignore one would seriously undermine the argument as it would be incomplete. It can however be difficult to understand the role of such causes when seeing them out of context. To fully comprehend the influence of the factors as determinants on asylum measures therefore, this paper will now attempt to combine the explanations in the relevant time scale to be able to effectively demonstrate how and why the CEAS is being created. The following chapter will examine the components external to their source categorization, emphasizing their location in the relevant timeframe and interaction with other factors, when inserting them into the path dependent model.

[26] Spencer, Sarah, ed. *The Politics of Migration: Managing Opportunity, Conflict and Change*. Blackwell Publishing, 2003 : 86

Chapter Three: The Path Towards a Common European Asylum System

The EU is a complex entity that functions slowly and deliberately. The legislative process involves a convoluted path with multiple points where proposed measures can be fundamentally changed or stalled indefinitely. Despite this however, numerous large-scale projects have been successfully implemented.[1] The creation of the CEAS must be considered a success, as prior to 1993 asylum remained entirely in the domain of national governments. Currently, the EU is in the process of agreeing the second phase of a system that intends to fully harmonize member-state's asylum law. Monitoring how the present situation has come into being requires that the path be examined. The focus of this chapter will remain on the structural creation of the CEAS, as negations to human rights obligations will be analyzed in the following chapter. This is not intended to be an all-inclusive analysis, but an overview of the main factors that combined to build the CEAS, as they determined the three trajectories, thus also established the constraints the actors faced. Charting the development will illustrate how through each successive trajectory, action was facilitated due to the different sets of limitations that gradually converged with member-states priorities.

The First Trajectory: Member-State Action

The initial trajectory is to be found prior to the Maastricht Treaty. The EU had no input or role in how asylum law and policy functioned. Member-states drew on their particular historical and cultural foundations to determine how they would respond to

[1] Examples include the single-currency, and a borderless zone that enables the Single Market to function effectively

asylum seekers and refugees. If and when cooperation was deemed necessary or appropriate, member-states worked on arising issues together with those who had also come to the same conclusion, but this was not compulsory, making such action uncommon. The greatest level of achievement in terms of inter-state negotiation in this period resulted in what is most typically called the Dublin Convention (or since 2001, Dublin I), signed by all the member-states.[2]

This agreement was to prevent two phenomena that were becoming increasingly widespread: *Asylum Shopping* and *Refugees in Orbit*.[3] The first was the conscious effort of the asylum seeker to find the best *bargain* in terms of refugee status. Benefits awarded to refugees, the length of the status, and the ease of gaining eventual citizenship were examples of elements that varied widely across the EU. Multiple applications by the same asylum seeker was considered abusive and something that required prevention. *Refugees in Orbit* in contrast was the scenario that saw asylum seekers being removed from one country and sent to another for reasons including prior presence there, but being denied entry into the supposed "receiving country". This left the individual in a dangerous limbo position, as neither country were accepting them as an asylum applicant, resulting in some cases where they were sent back to their country-of-origin, thus clearly potential instances of refoulement.[4]

The Dublin Convention proposed to solve both of these problems, as it would institute a system that would decide who the responsible state was. This would be beneficial as it would ensure every asylum seeker would be able to file an application, and that member-

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[2] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006.
[3] Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union*. New York: Intersentia, 2004 : 118
[4] Ibid.

states' determination systems would not be clogged due to asylum seekers filing multiple applications merely for personal choice. Representing a positive stride forward in establishing regional cooperation in the form of a safety net, this was the first significant development. It must however be recalled that this was the only major intergovernmental agreement that occurred in this trajectory. All other treaties and agreements tended to encompass far less and were signed by only a couple of states to deal with a problem specific to their location or situation.[5]

Another process that took place during this phase was *sub-regional development.*[6] States tended to follow the actions of their neighbors in order to prevent becoming the "soft touch". This therefore may not have been conscious negotiation and agreement, but this copycat model was an active approach in the first trajectory prior to the start of action at the European level.

The path that was being followed was constraining actions due to how the trajectory had been established. Immigration and asylum were universally considered to be state prerogative and had been since the rise of the modern nation-state. Linked to issues such as state sovereignty and territory, governments saw it as in their realm to have the ability to determine who was allowed inside their borders.[7] Understanding it in these terms gives a sense of how deeply-rooted this assumption had become. Hence, the EU at this stage had no serious aspirations to involve themselves in the internal affairs of political asylum. Reinforcing this was the contemporary debate on immigration. Following the post-World War II recruitment of labor that brought many permanent immigrants, public discourse

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[5] For more on this see: Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union.* New York: Intersentia, 2004.
[6] Byrne, Rosemary and others. "Understanding Refugee Law in an Enlarged European Union". *European Journal of International Law* 15 (April 2004) : 355-385.
[7] Hayter, Teresa. *Open Borders: The Case Against Immigration Controls.* London: Pluto Press, 2004.

focused on the need to reduce the flow into the state. Viewed as *the problem*, and branded as *the cause* of racial tensions, this sentiment was intensified by the extreme right parties that were beginning to rise into prominence. It had then been invigorated again by the substantial increase in numbers of asylum seekers arriving in the final third of the twentieth century, particularly in the context of the breakup of the Soviet Union.

An inherent constraint within the first trajectory therefore was the acceptance of unilateral action, with international cooperation as a mere possibility. This had the effect that policies regarding political asylum were centered on state aspirations and objectives, which could fail to comprehend the big picture, as a result limiting cooperation, and thus structural progress. Another restriction within the trajectory's structure was the Single European Act (1986), a treaty that all member-states had ratified, and as such obligated compliance. It reinforced the development of the continuing path, as it agreed to member-state dominance in asylum policy, exemplified in the statement:

> "Nothing in these provisions shall affect the right of Member-states to take such measures as they consider necessary for the purpose of controlling immigration from third countries."[8]

This firm statement clearly specified member-state authority, denying the EU any powers.

Other treaty commitments that required observance were the international human rights conventions, which included most significantly the Refugee Convention. This partially limited member-state action, as international protection to the persecuted could not be eliminated. Supporting this were various NGOs, the most prominent being the

[8] Sandholtz, Wayne and Alec Stone Sweet, eds. *European Integration and Supranational Governance*. New York: Oxford University Press, 1998.

UNHCR. The importance of these organizations at this stage was their location. They operated mainly in member-state capitals, lobbying governments, in their attempt to maintain high human rights standards. Their setting reflected the action-center. Hence, with agreement during this phase being within the bounds of the path, key constraints including prior treaty responsibilities and international norms, which were being reinforced by the circumstances within member-states and international developments, were shaping the limited amount of what was being developed.

The First Juncture: The Maastricht Treaty

Member-state action appeared to be functioning well, as states controlled this politically-sensitive issue, yet if they chose to, they could enter into inter-state bargaining. The first juncture occurred two years after the Dublin Convention was agreed due to reasons combining to force change.

The Schengen Agreement and the SEA were monumental, as they were to transform the core dynamics of European integration. Undoubtedly major accomplishments, these changes produced concerns and challenges in other areas. The plan to abolish internal borders and to facilitate freedom of movement were both centrally economic plans, as they would really allow for the single market to achieve its full potential. Although the quote above from the 1986 Act underlined member-state authority in the area of third-country immigration, the arising problem was that soon not only could EC citizens move around freely, but also third-country nationals. Problems associated with this would have to be resolved prior to the implementation of these integration developments. A very clear example of political spillover was the SEA, which permitted the Community to act

in areas that would ensure progress in the single market.[9] As Fritz Scharpf observed, this potentially enabled a very wide scope,

> "There will be hardly any field of public policy for which it will not be possible to demonstrate a plausible connection to the guarantee of free movement of goods, persons, services, and capital".[10]

Although the Dublin Convention had been signed in 1990, it was not due to be implemented until 1997. Some countries decided to implement the rules in advance of the official deadline, whereas others chose to delay, due to reasons of domestic politics. Italy for example, delayed as it was a politically beneficial decision. Many asylum seekers that entered Italy illegally did not intend to remain there but instead transit through and apply for asylum in a richer northern state. To implement the Convention earlier therefore, Italy would merely be opening itself to accepting numerous asylum seekers that would not have chosen to apply in the country. Therefore, with some delaying implementation, the problems it had been drafted to settle were ongoing, indicating limitations to the current intergovernmental approach. Another important factor was the end of the Cold War. With an end to the solid East-West divide, European states, whom had received a gradual dribble of asylum seekers each year from the Soviet Union, were now faced with an influx. Determination systems had not been created to process such large numbers, thereby creating a situation where governments had to respond rapidly and effectively. This was unlikely due to the current functioning. Finally, the economic recession that was hindering member-states only added to this need to seek a different framework in which

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[9] Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995. : 7

[10] Scharpf, Fritz. "Community and Autonomy: Multi-level Policy in the European Union". *Working Paper RSC 94/1* (Florence: European Union Institute, May 1994) found in Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995. : 7

to function. Hence, the plan to abolish internal borders, the problems including *asylum shopping*, and the sudden and dramatic rise of asylum applicants served to make the situation urgent. EU member-states were forced into action, responding to both events of their creation, unintended consequences and factors completely out of their control. As all were encountering similar problems, the idea of limited cooperation appeared advantageous.

The first juncture the EU took when agreeing in December 1991 was the Maastricht Treaty,[11] which created the pillar format, notably the third pillar, where the issue of asylum was located. Although it may appear that this juncture might not have created substantial change as asylum was still only under intergovernmental control, it did produce a framework that demanded member-states give attention to the issue in regular meetings, and therefore removed it simply from member-state arenas.

The Second Trajectory: Intergovernmentalism

The more formalized government cooperation, in the area of asylum, produced a number of agreements and conclusions from various working groups and Council meetings. These tended to be non-binding principles that members could choose to apply, and recommendations concerning joint methods of solving problems. The constraining factors in the path can be seen from two perspectives. The centrality of the member-state remained. Factors were inherent in the path that ensured this authority continued. However, the trajectory sanctioned increased cooperation at the European level, even if this was only providing a forum to discuss possible solutions for collective problems,

[11] Signed in 1992 and Effective in 1993. Also called the Treaty of the European Union (TEU)

thus seeing the first time the power balance between member-states and EU institutions tilt slightly away from the once totally dominant states.

An important example of cooperation in this trajectory was the conclusions of the London Resolutions, where a number of principles were advanced that sought to create a more efficient system on the European level. Concepts such as *Safe Third Country* and *Safe Country of Origin* were already circulating in Europe in particular sub-regions.[12] The recognition of such at the London Resolutions saw unified agreement on the EU level and promoted such practices to areas where they did not already function.

Another central development occurred in Brussels two years later when a readmission treaty template was drafted, which member-states could then use as a basis. Like the principles from the London Resolutions, this step was important as it defined an approach that encouraged member-state to act uniformly. The number of readmission treaties as a result increased after this agreement.

Having established the nature of the developments, an examination of the trajectory will enable a further understanding, as the context will illuminate how the path restrained and shaped what was produced. The Maastricht Treaty was a major force that helped structure this trajectory. It was a constraining factor as it obligated states to follow the agreements made in 1991. The infrastructural reformations had put asylum onto the political agenda of the newly created EU. It was therefore an area that became the central focus for some working groups and Council meetings.

The Maastricht Treaty documented the need for a harmonized approach towards immigration, as it called for a common migration policy. This was an acknowledgment of

[12] For safe third country see footnote 24 from Chapter 2 in this study. Safe Country of Origin was a term that denoted a country deemed safe thereby making an applicant from that country questionable or *Manifestly Unfounded.*

political spillover. With the Schengen zone due to be implemented in the near future, and the obvious problems surrounding the free movement of citizens in a borderless Europe, but not immigrants, Chief's of Governments in 1991 realized some form of cooperation was indeed necessary. This was not a new idea as Jacques Delors had spoken of it after the SEA was effected:

> "How could we conceive of an effective freedom of movement and settlement of persons within the Community without defining progressively the bases of a common immigration policy?"[13]

It was however new in regard to Council recognition. The impact of this was to keep political asylum on the EU agenda as a continuing focus, meaning that a larger number of measures were to be agreed to, even if they were non-binding.

Although EU institutions were denied a formal role in the process, Commissioners and their staff were able to attend the meetings of both the Council and the working groups, as did NGOs that began to expand, ensuring they were prepared on a regional as well as national front. Finally the EP was able to pass opinions in the area, and although they did not hold any legal weight, the expression was nonetheless legitimized by two factors. Firstly the area was officially under the remit of the EU, and secondly, as the only directly elected EU institution, a democratic component added weight to the opinions.

As asylum was situated in the third pillar, it was fundamentally preserved as an intergovernmental area. As such the member-states may have been obliged to discuss the issue but were left to their own devices when reaching agreement. Salience and sensitivity in this period were increasing, and were an important feature in the domestic

[13] Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995

arenas across the EU. This gave national politicians the incentive to keep control of third-country immigration and asylum, as to give something of this political magnitude to a higher power would have been politically damaging. Not only could the extreme right parties that were becoming more prominent across Europe attack such policies as giving away *state sovereignty*, but binding action taken at the regional level would constrain how national politicians could act on the domestic front. Additionally, there was much political capital from keeping it within the domestic sphere, as by implementing restrictive legislation, they could illustrate their *handling* of the problem.

The Second Juncture: The Amsterdam Treaty

The second juncture followed the first in less than a decade, partly because the Maastricht Treaty was both a result (the juncture) and a fundamental cause for the second juncture. Its compromise of putting asylum into the Union's framework but denying the EU a formal role had not been successful. It had given member-states too much power, as it demonstrated that to achieve results beyond non-binding principles and recommendations, the Union institutions would need more input. Member-States in this position had clearly only been concerned with their own priorities, refusing to transfer significant portions of what they perceived to be their sovereignty to a higher level. The need for additional forces, in the form of EU institutions or NGOs, to balance the output away from the insular notions of the states was fundamental if progress was to develop. This would entail transferring the issue from the third pillar to the first, so it could be under the Community method. This however would require that the deeply rooted assumption – that member-states should be dominant in areas associated with territory, border control, and third-country immigration – be overridden. A number of important

factors therefore had to combine to force a juncture in the established path, as the member-states had to admit the reality that some power had to be ceded to the Community.

First, the Bosnian Refugee Crisis had heightened the need to resolve issues surrounding refugees. With the war being on the *doorstep* of the EU, the striking images that filled the media stories across the EU brought the idea of asylum seekers to a close proximity. They could not simply be ignored due to their distance from the member-states. Also, the fact that the issue was now under the auspices of the EU, but they were unable to effectively respond to this crisis, revealed the shortfalls of this approach. A genuine humanitarian emergency had occurred and the response of *the* regional power had been embarrassingly limited.

The Schengen zone had been implemented in 1995 and then had fifteen states active in it.[14] The ability of the involved states therefore to determine who traveled into their territory was significantly diminished. The enlarged area also caused concern for the original five, as the southern states of Greece, Italy, Spain, and Portugal had weaker external border control, affecting the whole zone. With the continuing large flows of asylum seekers into the EU, this was even more problematic, because like EU citizens, they could travel around without hindrance. Finding a solution to a problem that was transnational required such, as a resolution.

The Refugee Convention was a continuing constraining factor, maintaining international protection as (at least) a component of refugee and asylum law. Ensuring this were the asylum NGOs, which throughout the 1990s had increased in number due to

[14] This was the EU (15) minus Ireland and the UK, plus Iceland and Norway.

the growing relevance of the issue at the European level. Not only had more arisen, but many became increasingly vocal in relation to the new restrictive measures that were being enacted across the EU in every member-state.[15] The call was for more involvement for EU institutions so as to counterbalance the overarching views of domestic governments that tended to be narrower, as national concerns and circumstances were prioritized over analysis that viewed the larger condition.

Not only were the institutions of the EU supported by various NGOs, certainly the institutions themselves were always in a position to enlarge their influence. This can be seen in part as political spillover. Both the SEA and Maastricht had restructured the EU, substantially changing the nature of integration. The introduction of policy areas to the Community method served to promote the idea that more in future would follow suit. As a more efficient process that produced better results, due to QMV replacing unanimity and the other institutions played a role ensuring narrow member-state interests were diluted, the institutions themselves pushed for a greater role in areas such as political asylum.[16]

The situation in member-states also could challenge the path, and the best example in regard to this juncture was the change of government in Britain in the 1997 election. John Major, as Prime Minister, had been implacably opposed to many of the provisions that were crucial for the passage of the Amsterdam treaty. Many commentators have noted the

[15] For more see: Tazreiter, Claudia. *Asylum Seekers and the State*. Burlington VT: Ashgate Publishing Company, 2004.
[16] Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration*. Washington DC: The Brookings Institution, 1995 : 10-14

initial relief that was felt on the continent when Tony Blair won the general election, as the approach Britain took when at the EU changed in nature.[17]

The signing of Amsterdam was the next juncture. All the phenomena explained above combined to ensure that the rigidity of the path was simply impractical and had to change route. Amsterdam transferred parts of the third pillar, including asylum to the first pillar, or EC Treaty. The continuing salience of the issue and protective nature of the member-states regarding it however produced a two-tiered result as although they agreed to eventually cede control to it by putting it in the Community Method, for the first five years a transitional period would be effective, which created a quasi-community method.

The Third Trajectory: Communitarisation

The final trajectory is what the EU is currently following, and has been since 1999. Although it is divided into two, as the transitional stage has some different constraints to that of the Community method, the difference as will be shown is not such to explain it in terms of two trajectories, for the basic framework is fundamentally analogous.

The transitional period began with the implementation of Amsterdam in 1999 and ended on the agreed date of May 1, 2004.[18] It was a period that, after the Tampere Conclusions of 1999, has since become known as phase one of the CEAS. Tampere established the need to create a common policy that would eventually function as a common system. In phase one, the basic building blocks or infrastructure were to be established. When highlighting the most important achievements, certainly a number of binding standards were signed. There were the Qualification Directive, the Reception

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[17] For more on this situation see: Fella, S. "New Labour, Same Old Britain?" *Parliamentary Affairs*. 59, No. 4 (2006) : 621-637

[18] This was with the exception of the Procedures Directive, as it should have been agreed in the quasi-Community method, but it had not by the chosen deadline.

Directive, the Procedures Directive, Dublin II, the Temporary Protection Directive, and the system based in Brussels that held the fingerprints of all asylum seekers and those caught entering illegally (Eurodac).[19] Without even divesting attention into these measures, it is clear that a significant amount was produced in this part of the trajectory, helping to illuminate the impact of the path's different framework that affected the outcome.

Possibly the most important determining factor when considering constraints within this trajectory was the Amsterdam Treaty, more specifically Title IV, which was added to the EC Treaty.[20] As the legal basis to EU action, the limits were all too clear. The EU was only allowed to establish minimum standards in specific areas (Qualification, Reception etc). The denial to be able to focus on any other initiatives sought to control what would be attempted. Also the provision of minimum standards blocked EC law from intruding too far into the national systems that were already functioning independently of the regional power. These strict guidelines represent a compromise the member-states were willing to agree on, as although asylum was to come under Community law, when establishing the basis of the common system, the member-states only allowed what they wanted to be created. Thus despite the constraining factors still existing, the preferences of the states had converged with forces pushing for European cooperation, which is

[19] Qualification – Directive 2004/83/EC
Reception – Directive 2000/9/EC
Procedures – Directive 2005/85
Dublin II – Reg. 343/2003
Temporary Protection – Directive 2001/55/EC
Eurodac – Reg. 2725/2000

[20] Within Title IV, it is Articles 62-66 that specify the legal basis of how the EU can function is regard to political asylum.

crucial to understanding why firstly such progress was made in this trajectory and secondly, why member-states ceded control.

The functions of the EU institutions were also established. When assessing these new roles, it is clear that a unique set of rules were produced for Title IV policy areas.[21] The Commission although was given the task of initiating legislation, which is the standard in the Community Method, they had to share this role with the Council, limiting their ability to set the agenda. They were however still able to encourage structural progress, as by proposing initiatives for the binding measures specified in the EC treaty, they ensured momentum was sustained. The EP only gained the power of consultation, which was rather ineffectual as the Council were still under no obligation to act according to their opinions or recommendations. Like the Commission however by adopting positions on measures, the drive in the process was maintained.

The second constraint in this trajectory was the objectives established at the Tampere Conclusions. It was decided that the specific measures would simply be the first phase of a larger project (the CEAS). As an attempt to reinvigorate the process, Tampere highlights the desire of member-states (through the Council) to stress the need for development in this area, reinforcing the idea that EU activity was now in line with member-states concerns, which is central to understanding the advancement of this trajectory.

Another factor was the war in Kosovo, as whilst it was unfolding in early 1999, a major refugee crisis occurred. This was not simply a result of armed conflict, but a war tactic of the Serbian forces that deliberately aimed to wreak as much havoc as possible by

[21] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006 : 50-53.

uprooting substantial portions of the ethnic Albanian population. Once again, the EU was relatively slow in responding. A system was established that appealed for member-states to voluntarily accept quota refugees, however there was a large difference when comparing the numbers received to those who had been displaced in the region of origin.[22] It proved to be a powerful indicator that the EU was not prepared for these types of humanitarian crises. Having refugees stranded at a border, not being able to flee from a conflict zone on the very doorstep of the EU and receiving no collective action from this Union was a sharp reminder of what had yet to be achieved. The media demonstrated this to the EU citizens, maintaining sensitivities. At the European level however, politicians were able to act favorably in terms of producing change for future such occurrences.

Another international reason for maintaining the issues surrounding asylum in public debate was 9/11. With a public shocked by the graphic images of this tragedy, politicians in Europe moved to both show solidarity with the USA (at least initially), and to attempt to improve controls in security to prevent similar events occurring in Europe. Illegal immigration became the focus, increasing attention to connected areas such as asylum, which served to stimulate action. Also, due to Al Qaeda's use of Islam, anti-Muslim sentiment began to rise, intensifying social tensions between much of Europe and their Muslim communities, whilst the desire to restrict new-comers escalated. This adverse effect provided an unhealthy climate in many countries as divides became apparent from communities perceived as *outsiders* or *foreign.* This was most clearly reflected in Le Pen's upset victory in April 2002. Immigration and asylum were issues that had

[22] Van Selm, Joanne, ed. *Kosovo's Refugees in the European Union.* New York: Pinter, 2000.

challenged Europe in a contentious nature for over a decade and despite efforts to deal with it, enough seemingly had not been done.

The period after the transitional phase has some new constraints that slightly alter the dynamics of the procedure. The Hague Programme set the agenda for the second phase, establishing the measures that are to be focused on.[23] Again structural progress has developed, particularly because the institutional constraints placed on the Commission and the EP have been removed, resulting in the functioning of the standard Community method.[24] These changes appear to have reigned in the dominance of the member-states, as the Council can no longer propose measures and is subject to QMV. They should have an impact on the number of agreements, as member-states no longer have an effective veto. The question about member-state strength however can be raised in relation to the power of the path. As already stated, once the path has been followed it is assumed to be too costly to reverse. Therefore, with the member-states having established the foundations of the CEAS and recognizing that the constraints within the path have converged with their concerns enables them to use the EU as a mechanism to solidify the system.

Another significant constraint is that on the first day of phase two ten new members joined the EU. Due to their location at the edge of the EU, they compose much of the external border, which indicates that illegal immigration is likely to plague them. With their less-advanced border control, smugglers and immigrants can use them as an easy entry point to the EU, particularly since nine of the ten new members joined the

[23] Peers, Steve. "Transforming decision-making on EC immigration and asylum law". *European Law Review* 30, no. 2 (2005) : 292-3

[24] Although it is the standard community method for the Commission, Council and EP. The ECJ is still limited. Chapter Four of this study will highlight the restrictions on this institution, as it is in regard to the human rights aspects

Schengen zone in December 2007. This will maintain the importance of the area on the EU agenda.

A central notion is that of the security based language and this is due to the recent bombings on the European cities of Madrid (2004) and London (2005). This terrorist activity has strengthened the emphasis on security, reasserting the need for more action in this area. Agreements that have increasingly focused on terrorism prevention have often been directly related to immigration, and have had clear ramifications on asylum policy. Also important in phase two developments is the need to work closely with third countries in order to prevent unnecessary movement. Political/religious activists who "espouse terror" also reaffirm the need for more measures. For instance, both Abu Qatada and Abu Hamza are two prominent Islamic preachers currently in the UK serving prison sentences.[25] The government is attempting to deport the first and to extradite the second. What both these infamous cases have led to however is repeated calls for further measures aimed at preventing more 'terrorists' from arriving. This focus on illegal immigration can be closely tied to asylum policy as they are both orchestrated by the same agenda.

In sum, the measures that are produced within a given trajectory reflect the constraints that are inherent within it. Action is limited to what is specified in regional and international agreements and events that shape discourse in a particular way. It also depends on how the institutional balance has been established, showing that the more dominant the member-states are, the less will be achieved due to the lack of external

[25] "Preacher Abu Qatada wins appeal". *BBC*. (9 April, 2008) Found at: http://news.bbc.co.uk/1/hi/uk/7338553.stm
"Abu Hamza could face extradition". *BBC*. (15 November, 2007). Found at: http://news.bbc.co.uk/1/hi/uk/7096244.stm

pressure and advice. Structural progression has certainly increased with each new trajectory, the current one now producing the most. Recognizing both the direct and indirect impact that actions and events had is crucial to understanding how the concerns and preferences of member-states have aligned with the constraining factors to stimulate institutional progress. Although the path dependent framework is notable for stability and therefore a lack of change, the fact that there were two junctures close to one another shows the inflexible nature that the first applied, together with global and national developments that can account for the second. The factors examined in Chapter Two have been shown to interact and implicate certain outcomes, directing what the EU can, and just as importantly cannot establish.

Chapter Four: Losing Sight of the Ideal

The EU has repeatedly dedicated itself, through its multiple espousals to a CEAS that follows the Refugee Convention comprehensively, to substantiate its moral character as a global actor. The significance of achieving this would serve to support the image of the EU as an entity focused on the individual and their rights. Certainly as the previous two chapters have established, the system is progressing structurally. Phase one, which sought to produce the basic building blocks, has been agreed and implemented. The Council during the Hague Programme illuminated the second phase, which the Commission is currently focused on, proposing directives that will now pass through a route that is not so completely dominated by individual member-state preferences. The content of the first phase measures was not however examined previously, so the purpose of this chapter is to question the nature of the foundations of the CEAS.

It will argue that basic structural progress does not necessarily maintain complete respect for international commitments, and with regard to the CEAS, the trajectories that have been established and followed have positioned the EU in a situation where failure is most likely. Although this is a strong statement, and certainly different degrees could be clarified, it is important to grasp the fact that whilst restraining factors such as the Refugee Convention exist to guarantee at least a measure of protection, there are a multitude of other components combining to prevent the EU from reaching its ideal position. The prioritization of other concerns over that of protecting the world's vulnerable together with institutional limitations prevent true observance to international obligations. By focusing on one of the phase one measures this chapter will revisit the

trajectories outlined in the previous chapter to examine why, despite there being structural progress, the EU has not met its ultimate aspirations. Although there are six *basic building blocks* that are equally significant, this chapter has chosen to analyze one, in the hope of illuminating how the trajectory constrains action, and essentially determines what the EU can produce. To show that the problems are not just in relation to this chosen measure however, examples and general observations of the other directives will be included.

The Council Regulation 343, agreed in February 2003 and implemented later in the same year, is more commonly referred to as the Dublin Regulation or Dublin II, since it is based on an earlier Convention that was decided in Dublin in 1990. Much of the content of the Convention has been transferred into the Regulation, making it necessary to examine both agreements to analyze potential human rights problems. This will allow for consideration into the two relevant trajectories so as to determine to understand both what is new and what is inherited.

The Dublin Convention and the First Trajectory

The Dublin Convention, as already specified, was an international treaty designed to determine which EU member-state was responsible for a given asylum seeker. To overcome the two problems of *asylum-shopping* and *refugees-in-orbit*, member-states agreed through intergovernmental negotiation to a treaty that would stop both practices. Within the context of structural progress, it was described previously as a significant step forward, since member-states were cooperating despite the absence of a framework encouraging regional action. Aside from this collaboration however, a number of

significant features were drafted into the agreement, which damaged the rights of refugees in the EU.

In relation to human rights concerns, there were three fundamental problems inherent in the Dublin Convention. A hierarchical structure was used to deduce which state was responsible. Within this was a provision that provides for family reunification if a family member had already been accorded refugee status in a member-state, but notwithstanding this, the main determining factor was the member-state that let the asylum seeker onto EU territory, either through legal routes, such as the state that issued the visa that facilitated entry, or illegally. If an asylum seeker penetrated the state's border and gained entry, it was this state that was given responsibility of the application. This fundamental connection is crucial, as responsibility for an asylum applicant acted as a punishment for failing to keep the claimant out.[1] The thrust of the Dublin Convention thus indirectly supported the need for an ever-increasing build-up of border control mechanisms, substantially reducing access to the asylum systems of Europe, as following this agreement, states were in a race to the bottom.[2]

The Dublin Convention provided a safety net in the sense that every asylum seeker was provided with the guarantee that they could file an application. However, it failed to address that the definition of a refugee and the procedures of determination were significantly different across the EU.[3] The Convention assumed that an asylum seeker was accorded equal opportunity in gaining refugee status regardless of the state they applied to. This idea however rested on false assumptions, as the differences through

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[1] Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union.* New York: Intersentia, 2004 : 140
[2] Badar, Mohamed Elewa. "'Asylum Seekers and the European Union': Past, Present and Future". *The International Journal of Human Rights* 8, no. 2 (2004) : 159-174.
[3] Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union.* New York: Intersentia, 2004 : 120

Europe were substantial. An instance that illuminates the divergences pertains to the identity of the agent of persecution. Neither France nor Germany recognized a person as a refugee if a non-state actor had persecuted them, whereas other states such as Britain and Belgium awarded refugee status for non-state persecution, provided that it could be established that the state in question was unable to protect its citizens against these forces. This obvious divergence can be revealed further when considering the example that if an asylum seeker from Algeria had been physically threatened by the Salvation Islamic Front and Algerian authorities were unable or unwilling to protect them against such abuses, then the result of the outcome would be completely different depending on which country the claimant applied to.[4] Although the UNHCR guidelines are not accepted as international law, many states do look to them as a source of reference when interpreting the Refugee Convention. They specify that nowhere is the political agent indicated and at no point is it hinted that the definition would be so limited.[5] Accordingly therefore, the UNHCR did not agree with the definition as interpreted by France and Germany and actively pursued an agenda to change this. This discrepancy along with the many other differences however offered significantly diverse chances of being accorded refugee status.[6] Thus, although an asylum seeker was guaranteed a hearing, this was the totality of that assurance, simply denoting *one* hearing. A decision from a member-state that denied refugee status to an asylum applicant was recognized across the EU,

[4] The House of Lords in Britain ruled against an asylum seeker being sent back to France through use of the Dublin Convention, as the definition differed to the degree that it would not be safe for this individual. Although this was decided by the British Court, no safety net was written into the Dublin Convention. For more see:
Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union.* New York: Intersentia, 2004 : 59

[5] Ibid. : 64

[6] For more see: Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union.* New York: Intersentia, 2004 : Chapter Three

preventing them from applying elsewhere, which ignored the fact that there were great differences, hence ultimately restricted a refugee's access to protection.

The final difficulty was the burdening of the problem on particular states. Some states admitted relatively few in number, due to being hard to reach, whilst others with borders nearer the source countries received a disproportionate amount.[7] This lack of team spirit had a multitude of problems associated with it.[8] Not only did it stimulate suspicion between members,[9] it also became the equivalent of a competition among member-states. The struggle became who could produce the most effective control measures to deflect asylum seekers elsewhere. With this setting, the impact on asylum seekers was not the concern, but rather the position of who could reduce the number of applicants most effectively. This emphasis reflected not protection of the vulnerable or the rights of refugees in international law, but the dominant, and usually insular, concerns that existed in member-states.

Having established these central problems, proclamations of progress that this instrument was created to assure refugees that they would receive a hearing is exposed as shallow. Limited in its offerings, this Convention was therefore an encouragement for more border control rather than establishing a treaty that effectively protected the world's vulnerable. A brief examination of the first trajectory reveals the collection of constraining factors that hindered a more benevolent approach.

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[7] This can be demonstrated most clearly by statistics from the early 1990s. Germany by far received more applicants than any EU member-states has received in a single year. For more see: Boswell, Christina. *European Migration Policies in Flux*. Blackwell Publishing, 2003 : 54-57

[8] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006.

[9] Ibid.

The first trajectory was where member-state action prevailed, which allowed for bilateral and international treaties to be attempted if there was enough political will. A lack of EU framework resulted in no pressure from the regional actors to cooperate. The member-states therefore were almost entirely dominant in transferring their political objectives onto international agreements. There were however two restraining components on the actions of the member-states. The first was presence of international law, most significantly the Refugee Convention. Even if refugee rights were to be curbed due to the passage of the Dublin Convention, a right to this protected status (to a degree) had to be maintained. Therefore though other international bodies such as the EU were denied access in shaping such instruments, the member-states were not acting in an international vacuum where they could simply transfer their precise wants on to the Convention. The second limitation on member-states was compromise forced by competing state demands. As a politically salient issue, a level of dissatisfaction with the chosen agenda was likely, due to the fact that nine countries each with their own state of affairs and preferred solution had to settle on one plan.

The political climate in member-states by 1990 had reached a sensitive level. The discourse surrounding immigration controls had transferred to the newly relevant topic of asylum seekers. With increasing numbers of applicants, due to the erosion of the Soviet Union, and predictions of this movement becoming even more intensified, policy-makers became nearly obsessed with the idea of *flooding*.[10] Media sensationalism and right-wing rhetoric from the populist parties, which was an increasingly established opinion merely served to exacerbate these concerns. Due to such fears circulating through the EU, the

[10] Boswell, Christina. *European Migration Policies in Flux*. Blackwell Publishing, 2003 : 52-54

Dublin Convention can be understood as the transfer of national concerns on to a regional instrument, with only a weak framework to resist such insular thinking.

The Schengen Agreement that was pressing for a borderless zone within the EU was adding to the unease of the presence of asylum seekers. With no internal borders, asylum seekers could move seamlessly around once the external border had been infiltrated. Knowledge of this combined with the already recognized problem of *asylum shopping* suggested that this latter problem would merely increase, creating the incentive to act preeminently to deter such a rise.

Consequently the Dublin Convention reflects the trajectory that produced it. It was a major step in terms of structural progression, as there was little inducement to cooperate on a regional level beyond that of resolving a problem, but in relation to humanitarian progression, the restrictions it placed on refugees did not guarantee access to a fair procedure with comparable definitions. Instead it simply sought to further the state's objectives of combating unmanageable asylum applications due to the perceived worry of influx and abuse to the systems.

The Dublin Regulation and the Third Trajectory

The third trajectory as summarized in the prior chapter has been envisaged to be significantly different in a number of ways. This is certainly true when examining the different group of constraints that is shaping output. Asylum has been moved to the EC pillar as established by the Amsterdam Treaty, but because of the transitional phase, only functions under a quasi-community method. The possibility for change is undoubtedly present. One way to illustrate this shift is in the number of binding measures that were

produced. But the question this chapter wants to raise is how the trajectory affected the content of the instruments.

Many commentators have noted that despite the potential for change, the Dublin Regulation can be characterized by its similarity to the Convention.[11] There are a couple of ways that the Regulation differs, but apart from two minor criterion changes, these are all procedural and are mainly in regard to time limits and the rules member-states must abide by in accordance to one another.[12] The basic framework and structure of the Convention has been replicated for the Regulation, transferring the fundamental problems that have been laid out above.

To briefly update the problems, the notion that the asylum systems give an equal chance to all applicants is still false. Even with the basic harmonizing measures of phase one, the determination systems across Europe still significantly differ because only minimum standards have been agreed upon. As Gina Clayton argues, deciding who is a refugee is ultimately a political decision, as depending on cultural and historical links alongside current political ties establishes how the country of origin is viewed in different member-states.[13]

Revising the idea of lack of solidarity, the reality in an enlarged EU illustrates it as being even more pronounced. The idea that responsibility for letting asylum seekers in

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[11] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006.
Da Lomba, Sylvie. *The Right to Seek Refugee Status in the European Union*. New York: Intersentia, 2004.
Guild, Elspeth. "'Seeking Asylum': Storm Clouds Between International Commitments and EU Legislative Measures". *European Law Review* 29, no. 2 (2004) : 198-218.
Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 425

[12] For more on the procedural changes see: Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 425
This section will not be focusing on these as they do not significantly affect refugee rights, but are more concerned with efficiency and the functioning of the system. This point alone however is revealing, as it demonstrates the priority of the Regulation. It was considered more important to revamp the system to make it more efficient, than it was to restructure it to better serve the rights of refugees.

[13] Ibid. : 38-39

amounts to responsibility for their application adds a great burden to many of the eastern and southern countries that joined in 2004. Smuggling rings tend to transport their clients across land so as to defy EU restriction efforts, because these borders are generally the weakest since being the most difficult to monitor. Composing much of the EU's external border, the new bloc has to confront the challenge of thwarting these established networks. The human rights problem arises because these member-states are not as prosperous as the northern and western powerhouses. Their asylum systems tend to be newer and not as well developed and as a result unqualified to cope effectively with large numbers of applications. The receiving states in the east clearly suffered from these problems, but the humanitarian implications must also not be overlooked. It is the individual asylum seeker that feels the brunt of these policies. The reception conditions are unlikely to be as well advanced and the procedures as well developed, signifying the reality that they may get a fairer hearing in another state, which they are unable to access. Malta, a small island in the Mediterranean Sea, also suffered from this Regulation.[14] As asylum seekers attempt to reach the European frontier so to be able to claim asylum, they use dangerous techniques to overcome the measures preventing them legal entry. The majority of boat journeys from Northern Africa previously aimed for Italy as the nearest destination, with the weakest borders. Now instead they can target Malta as an entry door, since it is not only closer, but its border control is the least advanced. Malta has applied on numerous occasions for burden sharing schemes to take the pressure off their system. Though this was rejected, Malta has received substantial sums of money from the

[14] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006.

Refugee Fund to erect new measures to block entry.[15] This border-control approach impedes a refugee's access to protection revealing the continuation of a central attitude that dominated the previous trajectories.

With the problems of the Convention not subsiding, why did the EU fail in its efforts to produce a new structure that might determine responsibility? Once again the most effective way to answer this is to consider the third trajectory's constraints. One of the most important factors was the transfer of a number of areas of the third pillar to the first in the Amsterdam Treaty. The EU institutions gained a role in the decision making process, especially the Commission, as they acquired the right to initiate legislation. They did however have to share this role with the Council and although they proposed the absolute majority of the initiatives in the area of asylum, the fact that the member-states could have done so limited their power in how the policy could be shaped.[16] This is because under the normal Community method, not only is the Commission the only institution that can propose legislation, but if they are dissatisfied with the amendments and the Council's shaping of the proposal, the initiative can be removed from the process, reinforcing the Commission's abilities as an agenda-setter. The Council's potential role in this process therefore preserved their ability to shape the measures. The very proposals that the Commission released during this trajectory could be substantially altered, creating the situation where the final measure had very little resemblance to the initial draft at all. This is particularly notable in the Dublin Regulation, where all but two of the Commission's new additions to the criteria were eliminated. One example is the concept

[15] The Refugee Fund – Directive 2004/904/EC

[16] The Commission in the area of asylum, proposed all but one initiative. That one was a failed idea from Austria. For more see: Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary.* Boston: Martinus Nijhoff Publishers, 2006 : 67

of family. In the Commission's original proposal, the family encapsulated more than just married partners, unmarried partners and underage children. The Council however, in their first meeting dashed the chances that this would remain in the instrument. Refusing to acknowledge that different cultures apply a wider interpretation of the family, they insisted on reducing the concept back to what had been formerly recognized in the prior measure. Applying their own conception to the Regulation thus was possible due to the dominance of the member-state via the Council over the Commission.[17] The original version planned by the Commission offered significantly more to refugees than did the final document. Hence, though the Commission could start the process more liberally, the actions of the member-states in the Council inhibited much of this in the development stages, producing measures that reflected their concerns and priorities over that of the refugee.

Also, although member-states did not propose in the area of asylum, they did in other Title IV areas, most prominently irregular immigration.[18] Not only did this reveal where the priorities of member-states lay, but this was where structural progress would be most developed. It was another way the Commission's powers could be diluted, as the agenda could be established by a member-state. Steve Peers points to one particularly clear example when France in 2002 proposed four initiatives before the Commission, thus

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[17] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006

[18] Title IV was the Justice and Home Affairs section that was transferred from the third pillar to the first in the Amsterdam Treaty, which includes, asylum, irregular immigration and visas among other things.
Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006 : 67

capturing control of the agenda, which is most commonly considered to be the institution's main role.[19]

The European Parliament gained limited powers with the decisions at Amsterdam. They were given the role of consultation. This meant in reality that they had to be consulted and they could issue an opinion, but there was no obligation for the Council to act on this opinion. If their views diverged from the Council, they could simply be ignored, and there was little they could do.[20] This was a common problem for the EP during this time. As Peers notes "the EP voted to reject the majority of Member-states' immigration and asylum initiatives."[21] The fact that these measures were nonetheless passed reveals the insignificance of the EP during this trajectory. In relation to the Dublin Regulation, the EP issued an opinion where it called for just "modest amendments", none of which were included in the final draft.[22] One of these was similar to the Commission's original proposal in that the concept of family should be extended. This failure represented their lack of power. Their liberal stance conflicted with the priorities of the Council, who has consistently been the most restrictive institution.

The Dublin Regulation was explicitly based upon a former convention. Although the other phase one directives had no obvious precedent, they were not simply new creations of the third trajectory. Prior regional and national policies lay the foundations for what was produced. There was never an intention to create a CEAS from the beginning. The

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[19] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006.

[20] If the EP did feel that the Council had defied international obligations, they as an institution could take the Council to Court over the issue. They have attempted this once, but the Court ruled it was inadmissible. For more see: Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 135

[21] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006 : 69

[22] Ibid. : 228

significance of unanimity in the Council led to the situation that member-states vied to retain their current practices.[23] Thus, due to member-states desire to preserve their current policies and laws, as liberalizing the asylum systems would portray them domestically as *soft*, the standards of the new instruments would have to be set at the level of or beneath contemporary functioning of their systems, deviating from the idea that the Refugee Convention would be of principal reference.

Compromise between member-states was a constraint of the first trajectory, and was still of fundamental significance. Where the Commission and EP could not force a more liberal positioning, sometimes member-states themselves had the ability to pull the member-states with the lowest standards up. Although this was a possibility, the practice of negotiation requires each of the conflicting parties to yield in order to generate an agreement. This scenario is best illustrated in relation to the Qualification Directive. The most contentious issue that defied resolution was the definition of the agent of persecution. Germany and Austria were both adamant that only a state could fill this, as this was how their national systems functioned. Other states however had a far wider interpretation and wanted the Directive to reflect this. To overcome such an obstacle, a separate provision was added stating that if there was a region within the country-of-origin that was deemed safe, even if it was merely under the enforcement of non-state actors, then refugee status would not be granted. The inclusion of this persuaded Germany and Austria, as now not only could non-state actors be considered as persecutors, (a step forward in terms of refugee rights) but also as protectors, which raised new concerns. The ability of an NGO to secure an environment equivalent to that

[23] Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006.

of a state is dubious at best.[24] The unanimity vote in the Council as a result is crucial to understanding the nature of phase one measures. Member-States certified the foremost objectives that would be reflected in the foundations of the CEAS.

Like both the Commission and the EP, the ECJ gained only very limited powers with the Amsterdam Treaty. The official position of the member-states declared that the Court was already a busy institution and they did not want to over-burden it.[25] Thus, it was merely given the ability to take cases from the highest state courts. This meant that lower courts in national systems could not apply for interpretation, seriously limiting judicial review in cases that are in regarding the notion of individual rights. The Commission has since expressed concern in the fact that this scenario has not been modified and although as Peers' notes, the criticism was late in coming, it has been made nonetheless and is as applicable to the transitional time period as it is now:

> "It is unacceptable that the decision foresees no adaptation of the powers of the Court, thus perpetuating a situation where access to the Court of Justice remains limited. The Commission is absolutely convinced that, in this area which so closely touches on the rights of individuals, an increased access to justice is equally essential to enhance legitimacy".[26]

Therefore, although the institutions certainly received new powers in the policy making process, the limitations were a great hindrance to the humanitarian aspects of what could be produced.

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[24] This example is from Peers. For a detailed examination of the negotiation processes for all the asylum measures see: Peers, Steve and Nicola Rogers. *EU Immigration and Asylum Law: Text and Commentary*. Boston: Martinus Nijhoff Publishers, 2006

[25] Baldaccini, Anneliese, Elspeth Guild and Helen Toner, eds. *Whose Freedom, Security and Justice?: EU Immigration and Asylum Law and Policy*. Portland Oregon: Hart Publishing, 2007 : 78

[26] Peers, Steve. "Transforming decision-making on EC immigration and asylum law". *European Law Review* 30, no. 2 (2005) : 290

Other constraints on the third trajectory included enlargement, a key event that had been decided upon in the EU: ten new member-states were due to enter the Union on May 1, 2004. Its impact on the basic building blocks reveals a division between the EU (15) and the new states. An obvious but important point to note is once the new states joined, there would be an increased number of demands at the negotiation table. The desire to establish the foundations prior to the enlargement highlights not only the want to agree to the measures more easily, but also the advantageous position the EU (15) were in. Whatever was decided prior to May 1, 2004, the ten new states would have to implement without having the ability to shape. Hence, retaining the basic structure which would (still) burden those nearer the source countries would encumber the new states rather than the existing members, and though this would not be explicitly stated, it can be seen as an inducement to be passing the Dublin Regulation as it was.

The political climate inside the EU member-states relating to asylum remained a contentious issue in public debate. Politicians were adamant in maintaining their control so as to be able to direct the wishes and priorities of their state onto the basic building blocks, thus ensuring the furtherance of their political agendas in this still polarized issue. Two key international developments additionally heightened this. The Kosovan refugee crisis drew renewed attention to the issue of asylum seekers on a regional level, which prompted Germany, who failed to promote burden-sharing, to assert their political will in continuing to further legislative development in this relevant field. Secondly, 9/11 can be attributed with securitizing the language of immigration and asylum. Fear of the outsider was rampant, ensuring additional efforts to block illegal immigration, which was a threat to refugees, as they generally had no other means of access. Pertaining to the Dublin

Regulation, 9/11 provoked calls for an increased need to control third-country nationals who were mostly represented by asylum seekers. The ability to know where they were and to control their movements was seen as imperative in the new environment of global terrorism.

The measures agreed in phase one are a manifestation of the amalgamated constraining factors inherent in the third trajectory. The same constraints that had restricted what the EU could structurally produce have also limited how the measures were to be shaped. Although there were significant differences in the basic progress between trajectories, the limitations remained consistent enough to deny change in the humanitarian aspects of progress. As a self-proclaimed moral entity in the world, the emphasis of their asylum policies should be on protecting the vulnerable. The EU has been incapable of attaining these high objectives, ensuring instead that the preferences of member-states due to events and actions, which have intensified the debate causing structural constraints, deny the possibility of balance in the proceedings. This lack of equilibrium has led to the scenario that the restraining components that guarantee refugee rights are simply outweighed by forces in the opposite direction.

Chapter Five: Humanitarian Implications

The inability of the EU thus far to shape an asylum system that fundamentally adheres to the rights of refugees has had damaging humanitarian consequences. The standards negotiated that establish the boundaries of what is considered acceptable fall disappointingly low. Although it must be reiterated that these basic building blocks merely ascertain the limits that member-states must remain within, due to the political climate outlined in this study, along with the theory of the 'closed sack' (implementing restrictive measures that neighboring states have employed, so as not to receive deflected asylum seekers and hence becoming a 'closed sack'), the reality suggests that states will not stray far from the line. To better comprehend the structural barriers that refugees encounter, when attempting to enter the EU and confirm their status, the UK's asylum determination system will be examined as a case study. Asylum laws are theoretically produced to protect those individuals fleeing persecution. However the current approach focuses nearly exclusively on control, so is undermining this basic intention and is forcing detrimental implications on the people it was designed to assist.

A crucial point that must be recalled is the simplification process that fails to distinguish between the various terms of refugee, asylum seeker, bogus asylum seeker, illegal immigrant, and economic migrant. This is important because a number of the measures that will be examined in the following discussion are in relation to illegal or irregular immigrants. Politicians use this term because it acts as a justification, as it is politically advantageous to demonstrate that illegal immigrants have been prevented from entering. What this discourse fails to reveal however is that some of the illegal

immigrants that have been denied entry are refugees, as the absolute majority of refugees enter illegally due to the restrictive measures. The fact that policy-makers fail to accommodate the needs of refugees in their other immigration measures, requires that this chapter not only examine procedures aimed exclusively at asylum seekers, but also those intended for the wider category of illegal immigrants due to the significant impact they have on refugees. Therefore when this chapter notes barriers hindering refugee access to safety, it is aware that these policies do, to an extent, also hinder the passage of those simply coming to better their lives, but fails to show any distinction between groups, so as such must be examined in relation to refugee protection.

Having examined European asylum law and the reasons for its development as it is, together with the larger human rights concerns, this chapter will now attempt to draw the focus of the study back to the idea of *the* asylum seeker. This will be done by considering the mechanisms in the British asylum process, designed to control and restrict, as tolerated by the directives of the EU. Dividing the process into three sections, the barriers that asylum seekers face when trying to enter the territory will first be explored. The very controls that intend to hinder the entry of illegal immigrants, such as visa requirements and carrier sanctions, erode the chances of refugees gaining status, illuminating the wide-reaching promises of the EU as ineffectual. The second group of measures are those created to impede access to the determination system, and therefore any possibility of being recognized as a refugee in Britain. Then finally, the initiatives that were intended to restrict the success rate of claims for those who gained access to the territory and the system. Refusal rate in the UK is on average seventy-five percent of applications.[1] This

[1] Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006.

high rate is often explained in two main ways. The first is that which the government claim, and the perception that the majority of the public hold, that it merely illustrates the high number of bogus asylum seekers that enter Britain, reinforcing the need for additional controls.[2] The other possible answer is that which tends to be advocated by human rights organizations: the system is designed impractically, as a bureaucratic maze that creates problems for asylum seekers.[3] This chapter, when examining this section of measures, favors more of a midway point in explaining this high ratio. Certainly the system does have features that hinder a refugee's progression to confirming their status, but the difficulty of determination must not be overlooked. To create a system that can not only deal with such enormous numbers, but also place every individual in a legally-established category is impossible. To be able to do so would imply that each person can be categorically labeled in absolute terms. As the UNHCR reasoned:

> "There is a grey zone: people who are leaving a country where persecution and discrimination are unquestionably occurring, and the economy is also dire. Are people leaving such countries for refugee reasons, or economic ones – or do both sets of reasons fuse into one that is, in many cases, almost impossible to unravel?"[4]

Despite this grey zone, this paper is assuming that there are many cases when the individual seeking asylum is without doubt fleeing persecution, as there are definitely those that are simply craving a better live. Thus, in addition to this grey zone, there is the problem of deciphering *who* is a refugee. With the main source of evidence being the asylum seeker's story, human judgment has to be able to distinguish potential truth from

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[2] Hayter, Teresa. *Open Borders: The Case Against Immigration Controls*. London: Pluto Press, 2004 : 5
[3] Whittaker, David. *Asylum Seekers and Refugees in the Contemporary World*. New York: Routledge, 2006 : 12
[4] UNHCR. *Refugees* 4, no. 148 (2007) : 2

potential lies. This leaves a system with multiple flaws, leaving the government the task of merely trying to minimize the effects of the problems. Presented via the three sections of measures, this chapter will demonstrate the comprehensive set of barriers and hurdles refugees must overcome to confirm their status in a member-state, which undermines the very claims and promises the EU makes in its international proclamations and legislative preambles. The CEAS, at least in its first phase, has not created a system that fully adheres to the Refugee Convention, which will be clearly shown in this chapter through use of the UK's current procedures. Prior to this discussion will be a brief overview of British particularities.

The UK

Without reproducing a detailed account of British statutes that frame the asylum determination system, it suffices to say that immigration legislation has mainly been a twentieth century process that became a pressing concern in the 1960s. Casting attention back to Chapter One's historical overview, the British experience was remarkably similar to those countries on the continent. One important difference to note was Britain was generally ahead in implementing immigration control, and watching the pattern progress throughout the twentieth century and into the twenty-first has remained as such.[5] Since the 1960s, legislation has focused on controlling immigration. This is in terms of monitoring the number of those entering, filtering those who enter, and also monitoring their activity within the territory, ensuring they comply with immigration restrictions.[6] Since this shift towards control, the general approach to immigration legislation has not

[5] Restriction policies in Britain were spearheaded by the 1962 Commonwealth Immigrants Act. Many continental countries restrictions began nearly a decade later. Commentators today still observe that the UK is the "motor" of much asylum co-operation. For more see: Boswell, Christina. *European Migration Policies in Flux*. Blackwell Publishing, 2003 : 111

[6] Hayter, Teresa. *Open Borders: The Case Against Immigration Controls*. London: Pluto Press, 2004.

been significantly altered. The idea of reduction has been transferred to asylum. Starting in the 1990s, a series of measures have been passed that are specific to asylum seekers. As numerous accounts suggest, this merely reflects the current concern that is present.[7] From 1993 to the present date, Parliament has passed six statutes attending to what many consider as an asylum *crisis*, each developing the restriction-based policies already in place.[8]

When considering British asylum law, there are three categories that combine to shape the system. There is primary legislation that has been passed through Parliament, which produces statutes. Secondary legislation is supplementary, in the form of rules that are established by the government in accordance with the details of the primary legislation. Additionally, there are the rulings by the judiciary that can have far-reaching effects on what the government may otherwise choose to do. Although all these areas are significant, the following discussion is not intended to be a detailed examination of legal contestation between the authorities, but rather it will attempt to illustrate general trends and currently functioning control mechanisms within the system, which prevent refugees from being granted their appropriate status.[9]

European law also features prominently in British politics. Although the British legal system is dualist, meaning EU Directives do not automatically apply, rather they have to be incorporated into domestic statute, what is decided on the European level is highly

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[7] Hayter, Teresa. *Open Borders: The Case Against Immigration Controls*. London: Pluto Press, 2004 : Chapter Two

[8] For more see: Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 15

[9] As Gina Clayton demonstrates, there is political tension between the Government and the Judiciary in the UK, as the Government often implements measures that are followed by Court action, which often advances the cause of human rights. The government is thus forced to work around this ruling. For more see: Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 38-40

significant.[10] The British, like the Danish and the Irish, have obtained special protocols that allow them to opt-out of certain areas of European law. This means that they do not have to abide by it; it also means, however, that they lose any right in shaping it, which would only become a problem if at a later stage they choose to opt-in. The British and Irish protocols enable them to opt-in to specific measures if they choose. The UK, although still remaining outside of a great number of measures, has opted-in to all the asylum directives.

Lastly, the body that determines refugees in member-states differs throughout the EU. In some countries, entities are established in order to demonstrate independence from government policy and agenda. However in the UK, the Home Office is accorded the task of judging asylum seekers in their bid to become a refugee.[11] The Secretary of State is the only official who can grant refugee status, causing numerous groups from both within Parliament and external to it to criticize this arrangement. Many argue that this structure is the reason why the asylum policy in the UK is so infected by the desire for increased border control mechanisms.[12] The very body that is attempting to control entry into the UK is also controlling refugee outcomes, creating a system that is incapable of acting outside of the bounds of its established agenda.

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[10]Patrick Ireland establishes three types of legal systems, 1. Dualist – implementation requires domestic legislation / 2. Quasi-dualist – implementation requires transformative act / 3. Monist – implementation is automatic. For more see: Leibfried, Stephan and Paul Pierson, eds. *European Social Policy: Between Fragmentation and Integration.* Washington DC: The Brookings Institution, 1995 : Chapter Seven

[11] Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 37

[12] Ibid. : 392

Measures Designed to Block Entry to the Territory

The restrictive measures in the first section are aimed at stopping asylum seekers from entering. To do so, visa requirements have been placed on refugee-producing countries and carrier sanctions established to enforce this. Without the correct documentation,[13] persons from these countries are unable to legally travel to the UK. Any immigrant who does enter without the correct documentation will result in the carrier being fined two thousand pounds per passenger.[14] This enforcement measure is enough of an incentive for both travel and freight companies to conform to the policy. A training program that the Home Office has created is designed to assist airport workers in spotting illegal documents. To increase enforcement, the government has recently created the position of an Asylum Liaison Officer, who is located in airports where refugees tend to fly from, both to re-check travel documents and to be available to advise airline companies. The government justifies these measures by establishing that not only do they prevent mass illegal immigration, but also if an asylum seeker in Britain were to have their claim rejected, travel documentation would be required to return them to their country of origin.

The measures do however lie in contradiction to the obligations of the Refugee Convention. If a refugee cannot enter the country, then the protection promised upon entrance is irrelevant.[15] What these combined efforts do not achieve is to prevent everyone lacking the correct documentation from entering – just some. Those who are

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[13] Correct Documentation includes a National Passport or Official Travel Document issued by the home country plus a British Government issued visa

[14] Carrier Sanctions were first introduced in 1987. In 1999, they were extended to include trains and passenger and freight vehicles. Although this caused tremendous outcry from truck drivers, as often smugglers planted asylum seekers in the back without their knowledge, the sea ports, such as Dover in Kent were considered to be targeted entry points for smugglers.
Bloch, Alice. *The Migration and Settlement of Refugees in Britain.* Palgrave, Macmillan Ltd., 2002 : 46

[15] Some commentators even say that this is a form of indirect refoulement, as denying them access to protection is the equivalent to sending them back to persecution. For more see: Goodwin-Gill, Guy. "'Editorial': Asylum 2001 – A Convention and a Purpose". *International Journal of Refugee Law* 13, no. 3 (2001) : 1-15.

entering are simply adapting to the current environment. Hence the problem is not being solved by current policy, but is forcing people seeking entry to use the services of transnational criminals. It encourages the production and sale of false documents and the smuggling of people across borders. These illegal activities have grown immensely due (indirectly) to restrictive legislation across Europe, because of the increasing demand for the services.[16] The dangers involved with smuggling are multiple and often fatal. On numerous occasions across Europe, asylum seeker corpses are found in trucks and other hiding places.[17] The dangerous boat crossings that many choose to make from northern Africa to either the Spanish Canary Islands, Malta, or Italy often result in much suffering and death.[18] Therefore, whilst this illegal activity cannot be deemed as good, it can be justified in the context, as otherwise those persecuted and in need of protection would be denied it by those countries that adhere to restriction-based policies. An interesting point of comparison was the position of Switzerland immediately after World War II. They proposed not to criminalize the actions taken by people who aided the journeys of refugees across international boundaries, even if this would be usually considered as illegal. Despite this being heavily rejected by the international community, the Swiss agreed so much to the principle, that they introduced it into their national Constitution.[19]

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[16] Morrison, John. *The trafficking and smuggling of refugees the end game in European asylum policy?* Pre-Publication Edition, July 2000 Found at: http://www.ecre.org/eu_developments/controls/traffick.pdf

[17] One particularly disturbing case occurred in Dover, Kent in 2000 when fifty-eight Chinese immigrants were found dead in the back of a truck during a routine inspection. For more see http://news.bbc.co.uk/1/hi/uk/796791.stm According to groups such as Amnesty International, this was merely a result of current policy. Those desperately wanting to enter were not dissuaded, but just adapted accordingly. The government alternatively used this as an example of why policy had to be extended. In Asylum and Immigration (Treatment of Claimants etc) Act in 2004, the Labour Government strengthened port security by supplementing current procedures with more technology such as heat sensors.

[18] The UNHCR frequently report statistics and details of deaths that do not always reach the national media. The fourth UNHCR journal of 2007, published a table recording four hundred and fifty deaths in sixteen separate incidents in a period of just three weeks of people attempting to gain access to Europe. Their ill-fated journeys are an indirect consequence of this first set of restrictive measures. See: UNHCR. *Refugees* 4, no. 148 (2007).

[19] Hayter, Teresa. *Open Borders: The Case Against Immigration Controls*. London: Pluto Press, 2004.

Additionally, further implications of these restrictive policies have direct consequences for would-be refugees.[20] One fact about asylum seekers is that the majority are young, single males. This is not to suggest that this group might not have a valid claim to refugee status, but those that are left behind, the not-so-physically-able, the old, those with children, those lacking financial resources to purchase the required services, are just as vulnerable. The policies disregard such possibilities, and the government, by merely observing the reduced numbers of people arriving, somehow illogically assume that those that are denied entry are the undeserving, not the most vulnerable who are unable to make the journey.

Other measures to prevent asylum seekers from arriving include the reduction of benefits through the introduction of a voucher system and working restrictions. The first initiative makes the assumption that the reason so many illegal immigrants arrive in Britain is the substantial benefits they will receive. The government policy to distribute vouchers, which can be exchanged at specific large stores, instead of cash it is argued, eliminates this 'pull' factor. The intended result is that those entering the country are only those in need of protection, and not personal gain. Denying the right to work for twelve months uses the same logic, as it is intended to stop economic migrants from entering through the asylum system.

Adverse effects however are felt by asylum seekers who were not drawn by the system of benefits. The controversial voucher scheme isolates and highlights asylum seekers, maintaining them as different in their community of residence. Also there have

[20] The definition of a refugee requires that the individual travels across an international border. A would-be refugee refers to a person that has not traveled across a border but if he or she had, then they would have received refugee status. UNHCR would refer to them instead as Internally Displaced Persons (IDP)

been numerous cases highlighted of asylum seekers having to walk miles to reach the nearest store that accepts vouchers. Another important point is the deeply rooted networks that exist in ethnic communities and how they benefit economic migrants. Obtaining work is often not difficult when knowing the right contacts. Benefit reduction and working restrictions therefore are undermined by these associations. Post World War II immigration enabled these networks to become deeply rooted in many northern and western European countries, indicating problems with current policy approaches.[21]

Measures Designed to Block Access to the Asylum Determination System

The second section of policies prevent asylum seekers from applying once they have arrived in Britain. The reasoning here is that of *Safe Third Country* or *Safe Transit Country*. This means that for the asylum seekers to have reached Britain, they must have transited through another *safe country*.[22] According to the logic of British law, the first *safe country* the asylum seeker enters should be where they remain. The idea of traveling through multiple *safe countries* to reach a destination of choice, it is argued, only proves that these immigrants are not seeking protection but the benefits of a particular state, making their resolve questionable. To combat this, border control has been steadily increased over the past decade and UK immigration officers are now present in northern France and Belgium to try to intercept the movement of illegal immigrants.

If the immigrant is not stopped in transit, the first stage of the asylum determination system in the UK is intended to categorize the asylum seeker to determine which route

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[21] Hatton, Timothy. "Seeking Asylum in Europe". *Economic Policy* (April 2004) : 5-62.

[22] A *safe country* has a long legislative history in the UK. It was first in the form of a White List in 1993, the structure of the concept was fundamentally changed in 2001 after the House of Lords ruled in *R* v *SSHD ex p Javed and Ali* [2001] that the inclusion of Pakistan undermined the concept of a safe country because there was a record of widespread discrimination and persecution against women. The government to counteract then established three new categories, which due to the structure would override the Court's decision. For more see:
Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 421

they will take through the system. (The system will be explained further in the next section). The first step is known as 'the screening interview'. The point of this is to ascertain basic facts, such as personal information and how the asylum seeker arrived in the UK (transit route, illegal documents, use of smuggler etc). Biometric data is taken from the asylum seeker, which is used for two reasons. First, it is sent to the Eurodac storage facility, which enables the UK to know if the asylum seeker was processed elsewhere in transit, which would subsequently relieve them of any responsibility due to the Dublin Regulation, as the asylum seeker could be returned. Secondly, if Eurodac fails to match the fingerprints, the biometric data is put onto an identity card for the asylum seeker.

Again this notion of a *safe country* runs in direct contradiction to the logic of the Refugee Convention. To return asylum seekers to *safe countries* is to push the burden onto another state. It is the asylum seekers that bear the brunt of this policy. They can be removed to another EU state that they have transited through, which they may feel less association to, due to factors including contacts they have in the country of intent or knowledge of the language.[23] Their compatibility to a state is rarely taken into consideration as removal of immigrants helps the statistical success of policy objectives. The other removal location may be to a state outside the EU, in which facilities and conditions are not adequate to maintain asylum seekers. An example is Ukraine where a national newspaper referred to the country as a "sludge tank (dumping ground) of illegal migrants".[24] It is reported that "Reception and detention centers are either non existent or

[23] The UNHCR guidelines specifically note that asylum seekers should be allowed a choice in where they apply.
[24] UNHCR, Refugees, Vol. 2, No. 135 (2005) p. 15

they are in an appalling condition."[25] A charity organization has established accommodation for homeless asylum seekers where up to twenty-three women can share one room.[26] Although considered a *safe country* by Britain, where if proof of transit can be obtained the asylum seeker will be sent back, many Ukrainian laws are not yet harmonized with the Refugee Convention, making its *safe country* status questionable. Having to accept these entrants due to negotiated readmission agreements, the unbalanced playing field is important when thinking of these commitments. The leverage the EU has over neighboring states is powerful for a number of reasons. These include the eventual desire for those in the East to want to join the Union, pressuring them to have political agendas that strengthen their relationship and illustrate their commitments to the same objectives as the EU. Another reason for the leverage, is in relation to the approach that was agreed upon at the Council meeting in Seville (2002), where it was decided that future readmission agreements would simply be inserted into other treaties, including trade deals.[27] This has left the scenario where, if a state wishes to trade with the largest trading bloc in the world, they might have to accept the provision of assuming responsibility for asylum seekers who have transited across their state, making this decision somewhat less than a choice.

Further implications of this policy include the EU having formed a surrounding buffer zone where asylum seekers are discarded to. Not able to support them, the impact on that society must also be noted. Rising tensions of racist and nationalist sentiment creates an environment where the safety of asylum seekers is questionable, especially when

[25] UNHCR, Refugees, Vol. 2, No. 135 (2005) p. 15
[26] UNHCR, Refugees, Vol. 2, No. 135 (2005) p. 17
[27] Hayter, Teresa. *Open Borders: The Case Against Immigration Controls*. London: Pluto Press, 2004

considering potential concerns over the rule of law. The effects of the EU's border enforcement and leverage when dealing with neighboring countries overburdens that state. Another possibility is the idea of mirroring policies, pushing the burden of asylum seekers further away again.

Measures Designed to Deny Refugee Status

The final section of restrictive measures seek to reduce success rates in the asylum determination system. The system has been recently remodeled, with a clear emphasis on efficiency and speed.[28] A basic overview will be adequate to allow for a discussion. The 'screening interview' determines whether the asylum seeker enters the system, then specifies which route or 'segment' they are to take. The government has called for nine segments, one of which is a fast-track process in a detention center, where the entire application process takes only eleven days and holds no right to an in-country appeal. Other detained segments have an in-country appeal, but maintain strict time limits. Another procedure is designed for unaccompanied minors. Then there is the 'general casework'. Most of this category are dispersed into the community, but if absconding seems likely, they can be detained as well. All asylum seekers in this new model receive a case worker with their application. This has been implemented to ensure stability and certainty.[29]

Measures that weaken a refugee's ability to receive confirmation of their status can be separated into three interrelated sections. The first is through the many procedural requirements in the asylum process that applicants must follow. There are deadlines for reporting to the authorities to initially claim asylum, deadlines for forms that have to be

[28] New Asylum Model, in Immigration, Asylum and Nationality Act (2006)
[29] British Refugee Council. *Briefing: The New Asylum Model* (August 2007)

filed and interviews that have to be attended.[30] The sheer numbers of applicants in the system, the government argues, requires strict adherence. Although an asylum seeker's application can no longer be rejected if the applicant merely fails to abide by the rules due to Court action, new government measures are aimed at forcing compliance to time restrictions. In cases where detention is used, enforcing observance of the deadlines is mere formality. On the other hand, in cases where the asylum seeker had been dispersed into the community, the assigning of a case worker accords responsibility to a professional who has sufficient access to the claimant to be able to stress the importance of deadlines and interviews. Although a refugee cannot be rejected merely on the basis of procedural deadlines, as some acknowledgement to the substance of their claim must be taken into account, it can damage their application. The government endorses this practice, as they state that if the applicant is a genuine refugee, their priority will be to complete what is required, so their application can pass smoothly through the system. Failure to comply makes a claim questionable. What is not taken into account by the government is the issue of suffering. Many genuine refugees are from war-torn or conflict-ridden countries and are often deeply traumatized. On top of this, they often need time to recover from the difficult journeys they have undertaken.[31] The procedural deadlines therefore may not be at the forefront of their minds, creating the situation where refugees are having their cases damaged due to the bureaucratic needs of the system that is unable to address humans.[32]

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[30] Ibid.

[31] Wilson, John P. and Boris Drožđek, eds. *Broken Spirits: The Treatment of Traumatized Asylum Seekers, Refugees, War and Torture Victims*. New York: Brunner-Routledge, 2004.

[32] Bloch, Alice. *The Migration and Settlement of Refugees in Britain*. Palgrave, Macmillan Ltd., 2002 : 54
For more on the topic of trauma and asylum seekers see Broken Spirits (above).

The second measure to limit the success rate of the asylum determination system considers the interview stage. Officers that interview asylum seekers are provided with Operational Guidance Notes (OGNs), which are country-specific, both introducing the national situation and what denotes a justified reason to grant refugee status. NGOs have criticized these guides due to the method in which they are compiled. The Home Office lacks their own research teams, so information is collected from other sources and positioned in a "positive slant".[33] Responding to another instance of criticism – that of implementing blanket policies for asylum seekers, the government included an element of flexibility in the process by enabling the acting officer to make the necessary accommodation according to personal situation. This however demonstrates the arbitrary nature of the interview procedure. Although those who interview asylum seekers have (supposedly) objective criteria, they use subjective devices to determine the status of an asylum seeker. It is a formidable task to determine who is, and who is not, a refugee. Though both international and domestic law specify the criteria for such categorization, this legal jargon has little relevance in the realities of the decision-making process. Its presence as a guide can merely serve as a justification for whatever is decided, whether this is truly the right decision or not. How does one really know if an asylum seeker has faced persecution or not? It is a process that includes huge discrepancies. As the UNHCR recognized, "there are people who articulate a false story well, and people who articulate a good story badly – or not at all (because it is too painful and too personal)".[34] Robert Thomas notes, when examining the appeals procedures, many cases that are overturned

[33] Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 414
[34] UNHCR. *Refugees* 4, no. 148 (2007) : 2
For more on the subject of interviewing asylum seekers and the difficulties involved in this process, see the revealing accounts found in: Showler, Peter. *Refugee Sandwich: Stories of Exile and Asylum*. McGill-Queen's University Press, 2006.

are not in reference to the first decision, but considered purely in its own merit.[35] To show the flaws of this process, a fifth of the cases originally rejected are accepted in the appeal. Considering the importance of this, the fact that recent legislation has reduced the appeals procedure from a two-tier to a one-tier system suggests that the number of revisions will be reduced, due to this measure, which is statistically advantageous for policy makers, but raises serious concerns on humanitarian grounds.[36]

The last initiative produced by the government to increase the rejection rate, is the list of *safe countries*, which has produced the notion of *clearly unfounded cases*.[37] If an applicant comes from a country declared *safe*, although they will still receive entrance into the determination process, they will be placed into one of the fast-track systems. If they are rejected, they still obtain the right to appeal, but they can only do so from outside of the UK. Removal is the precursor to appeal for those that are fast-tracked.

The fast-track systems are usually in detention centers. Hence, not only is an asylum seeker (still a potential refugee) in a detention center, very similar to or an actual prison, but also their application is being quickly pushed through a system that involves all the subjective discrepancies, which is additionally already highly suspicious of their claim. The fact that decisions in the fast-track segment in the *New Asylum Model* are to be determined in just eleven days raises problems for traumatized refugees. Those in shock and suffering from terrible ordeals may not be able to discuss details of events in such a limited time span. Also, the Statement of Evidence Form has been taken out of the

[35] Shah, Prakash, ed. *The Challenge of Asylum to Legal Systems*. Routledge Cavendish, 2005 : chapter nine
[36] Asylum and Immigration (Treatment of Claimants etc) Act, 2004
[37] Nationality Immigration and Asylum Act, 2002

process.[38] When discussing this form, the Refugee Council stated, "this period of preparation and reflection gives individuals an opportunity to disclose sensitive details of traumatic events".[39] Such changes would create a situation where the real substance of some of the claims would not be expressed, thus the decision would be based on only partial evidence. This has a negative impact on individuals potentially fleeing persecution, as due to the arbitrary decision to deem the country *safe*, the applicant may feel significantly less protected.[40] Also, the right to appeal from outside the UK is potentially very dangerous if the failed asylum seeker is in fact a refugee fleeing persecution. A promise of appeal through the British embassy in the *safe* country would be of little help in the context of possible threat.

In summation, this chapter has revealed the depth and range of obstacles that hinder a refugee's access to safety. The ability of some to overcome such impediments decides their fate. This comprehensive set of barriers is ultimately intended to reduce numbers, without discrimination to whom they are affecting. All are acceptable in terms of the EU's basic building blocks, raising serious questions in regard to how the CEAS is progressing. With the foundations established at such a low level of protection, the ability

[38] The Statement of Evidence Form was the initial form that supplemented the Asylum Interview. It was a comprehensive set of questions as shown by the fact that there were over one hundred and twenty questions. Although some NGOs criticize its removal from the procedure, it also received substantial attack when it was used, because asylum seekers had no guarantee of translating facilities and due to the deadline system , they would have ten days to file it. For more see:
Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006.
[39] British Refugee Council. *Briefing: The New Asylum Model* (August 2007) : 5
[40] Gina Clayton demonstrates the arbitrary nature of deeming countries safe when considering the example of Bangladesh. Widespread persecution and torture had been reported as common, but the government planned to add Bangladesh to the list of safe countries. The court ruled against this in 2005. For more see:
Clayton, Gina. *Immigration and Asylum Law*. New York: Oxford University Press, 2006 : 406

of the EU's institutions to steer the second phase into a more humanitarian direction is substantially unlikely, as it can only supplement the chosen basis.

Conclusion

The CEAS is a work in progress; it is a project that aims to uphold refugee rights to the highest standard but also intends the system to be efficient and effective in the context of the challenges that exist in the contemporary global environment. Due for completion in 2010, the second phase although has not been analyzed within this study is revealing a focus on preventing illegal immigration and promoting returning initiatives for those with a rejected claim. With directives being produced that reinforce concepts of border control, state prerogative thus still appears to be dominating the process. The member-states of the EU when following the established paths were primarily concerned with their own priorities. Having transferred a significant amount of power to the EU with the Amsterdam Treaty, the question must be raised as to why they might choose to stunt their influence in this area. When pooling their power however, although it may appear as if they are losing influence, the path's constraining factors had converged enough with member-states priorities so as to reinforce their influence. Deciding what could be produced and in what forum, the creation of the founding standards of the CEAS were performed in very controlled environment. With the path enabling them to perform a decisive role in this, member-states realized the cost of reversal are too great, so not only is it highly unlikely that the EU will reform phase one, but any action the EU now takes will be supplementary to the original groundings, suggesting that because of the power of the path the direction is effectively unable to change.

Returning to the notion of progress, it has been considered in a multi-dimensional format in this paper, enabling two interrelated conclusions to be drawn from the evidence

presented. The first is in relation to basic or structural progress. There is a clear trend of advancement in the integration of asylum policy in the EU. Comparing cooperation and output of the trajectories – the further the EU developed the negotiation framework, the more results were created. The importance of a structured forum to facilitate discussion on a regional level has been highlighted. This was gradually due to the number of treaties that established a framework on which the issue would reside within. The culmination of events and actions in member-states, on the European level, and more widely on the global stage were to impress upon the member-states the necessity to cooperate in an area that was producing transnational crises. It also pointed to the increased role of the EU institutions, which enabled them to press for further agreement, obliging member-states to look beyond their immediate concerns to acting within the framework of the larger context. With this obvious progression, integration at the level of the EU is being accomplished and is on target to reaching a common status and procedure as planned. The reverse of this however relates to the content of agreements, which according to the objectives, are to be fully compatible with international standards, specifically the Refugee Convention. This is where the questions associated with progress can be duly raised, as the incapability of the EU to reach their ideal position hinders there very espousals that a system is being created. The primary purpose of refugee and asylum policy should be to protect those individuals fleeing persecution. If the system does not fundamentally respect the rights of refugees then the creation is all but hollow. This study however went further than simply attempting to illustrate this, it also attempted to explain why such a system was wholly un-creatable.

Guy Goodwin-Gill, when considering the question between the ideal and reality stated, "The question is whether the EU can remain true, or even close to, the principles, which it claims to endorse?"[1] In phrasing it this way, the underlying assumption is that the EU as an entity made a conscious choice in how it would shape the system. But as this study has tried to present, although there is a level of conflict between the member-states and the institutions each vying for power, the ability of member-states to gain the dominating position was because the trajectory's constraints had aligned with their preferences. The path as a rigid framework determined how the CEAS would be shaped. Although the actors assisted in creating the path, events and actions aside from them crucially interacted to help set the structure. So returning to the quote, this paper comprehends the CEAS to be a product of the path, rather than a system purposefully manipulated and shaped by the actors.

By using a path-dependent framework, the very constraints that were hindering this deeper progress were present from the outset of each of the paths. These factors combined to establish a very specific path that the EU was to follow, with no derogation permitted. The result of this is that all the measures produced were a manifestation of the trajectory, reflecting the constraining factors. As this paper demonstrated in Chapter Four, although the constraints had allowed the system to be structurally created, they did not ever move to the state where enough factors were in position to force action in accordance to refugee rights. The only restrictions in accordance to this were community espousals and the international law requirements, which due to enforceability problems were not strong enough to match the power of the other components that were in

[1] Goodwin-Gill, Guy. "'Editorial': Asylum 2001 – A Convention and a Purpose". *International Journal of Refugee Law* 13, no. 3 (2001) : 3

opposition. The culmination of this opposing force guaranteed that although refugee rights would remain a feature, they would not dominate the central focus and nature of the system as a whole.

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Vita

Jennifer Humphreys was born on February 11th 1984 in Margate Kent in the UK, to Kathryn Humphreys (née Lord) and Paul Humphreys. Completing her high school education in her home town, Jennifer then undertook an undergraduate degree at the University of Kent in Canterbury, earning a Bachelor of Arts with Honours in American Studies (History). Since August 2006 she has been a student at Lehigh University, Pennsylvania in the United States where she completed a Masters Program in Political Science. Whilst doing this, Jennifer was also employed by the university as a Teaching Assistant in the political science department.

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